(1)

FILED

No. 01- 01 775 NOV 17 2001

OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

REAL PARTIES IN INTEREST,
INCLUDING WALTER UMPHREY, JOHN O'QUINN,
JOHN EDDIE WILLIAMS, WAYNE REAUD AND HAROLD NIX,

Petitioners,

v.

STATE OF TEXAS,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

GRANT KAISER
KAISER & MORRISON, P.L.L.C.
440 Louisiana, Suite 1440
Houston, Texas 77002-1634
(713) 223-0000

MICHAEL TIGAR
Counsel of Record
THE TIGAR LAW FIRM
1155 Connecticut Avenue, N.W.
Suite 400
Washington, D.C. 20036
(202) 467-8583

JONATHAN S. MASSEY
JONATHAN S. MASSEY, P.C.
3920 Northampton Street, N.W.
Washington, D.C. 20015
(202) 686-0457

Counsel for Petitioners

BATEMAN & SLADE, INC. BOSTON, MASSACHUSETTS

78 pp

QUESTION PRESENTED

Whether, in an interlocutory appeal under the collateral order doctrine, a court of appeals may exercise "pendent appellate jurisdiction" to review unrelated questions in the lawsuit – without ever deciding the issue that supposedly provides appellate jurisdiction.

LIST OF PARTIES TO THE PROCEEDINGS

Pursuant to Rule 14.1(b) of the Rules of this Court, petitioners state that the parties to the proceeding in the court of appeals were:

Petitioner-Appellant
State of Texas

Respondents-Appellees
Walter Umphrey
John M. O'Quinn
John Eddie Williams, Jr.
Wayne A. Reaud
Harold W. Nix

TABLE OF CONTENTS

QUESTION PRESENTED i

PARTIES TO THE PROCEEDING ii

TABLE OF AUTHORITIES iv

OPINIONS BELOW 1

JURISDICTION 1

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 1

STATEMENT 1

1. Procedural History 3
2. The District Court's Decision 5
3. The Fifth Circuit's Decision 5

REASONS FOR GRANTING THE WRIT 6

A. THE FIFTH CIRCUIT'S HOLDING CONFLICTS WITH BINDING PRECEDENT OF THIS COURT . 7

B. THE FIFTH CIRCUIT'S HOLDING CONFLICTS WITH DECISIONS IN OTHER CIRCUITS 10

CONCLUSION 22

APPENDIX

APPENDIX A: Court of Appeals Decision 1a
APPENDIX B: District Court Decision 14a
APPENDIX C: Order on Rehearing 47a

TABLE OF AUTHORITIES

Cases **Page**

Abney v. United States, 431 U.S. 651 (1977) 2, 6, 8
Acevedo-Garcia v. Vera-Monroig, 204 F.3d 1 (1st Cir. 2000) 13
Archie v. Lanier, 95 F.3d 438 (6th Cir. 1996) 12-13, 16
California v. Campbell, 138 F.3d 772 (9th Cir.), *cert. denied*, 525 U.S. 822 (1998) 18
Carver v. Foerster, 102 F.3d 96 (3d Cir. 1996) 16
Cherry v. University of Wisconsin Sys. Bd. of Regents, 2001 WL 1028282 (7th Cir. Sept. 7, 2001) 17
Cobbledick v. United States, 309 U.S. 323 (1940) 10
Cohen v. Beneficial Indus. Loan Corp., 337 U.S. 541 (1949) 1
Cunningham v. Gates, 229 F.3d 1271 (9th Cir. 2000) 17
Cunningham v. Hamilton County, 527 U.S. 198 (1999) 9
Davidson v. Chestnut, 193 F.3d 144 (2d Cir. 1999) 14
Digital Equipment Corp. v. Desktop Direct, Inc., 511 U.S. 863 (1994) 9
Eagle v. Morgan, 88 F.3d 620 (8th Cir. 1996) 17
E.I. DuPont de Nemours & Co. v. Rhone Poulenc Fiber & Resin Intermediates, S.A.S., 2001 WL 1229797 (3d Cir. Oct. 15, 2001) 15
Entergy, Arkansas, Inc. v. Nebraska, 241 F.3d 979 (8th Cir.), *cert. denied*, 70 U.S.L.W. 3240 (U.S. Oct. 1, 2001) 17
Firestone Tire & Rubber Co. v. Risjord, 449 U.S. 368 (1981) 9
Flanagan v. United States, 465 U.S. 259 (1984) 10
Foote v. Spiegel, 118 F.3d 1416 (10th Cir. 1997) 20
Foy v. Schantz, Schatzman & Aaronson, 108 F.3d 1347 (11th Cir. 1997) 21
Garramone v. Romo, 94 F.3d 1446 (10th Cir. 1996) 20

Cases (Continued) **Page**

Gilda Marx, Inc. v. Wildwood Exercise, Inc., 85 F.3d 675 (D.C. Cir. 1996) (per curiam) 11
Haney v. City of Cumming, 69 F.3d 1098 (11th Cir. 1995), *cert. denied*, 517 U.S. 1209 (1996) 21
Harris v. Board of Educ. of Atlanta, 105 F.3d 591 (11th Cir. 1997) 21
Hinson v. Edmond, 205 F.3d 1264 (11th Cir. 2000) 20
Hoechst Diafoil Co. v. Nan Ya Plastics Corp., 174 F.3d 411 (4th Cir. 1999) 10
IDS Life Ins. Co. v. SunAmerica, Inc., 103 F.3d 524 (7th Cir. 1996) 11
Ierardi v. Sisco, 119 F.3d 183 (2d Cir. 1997) 15
In the Matter of Rimsat, Ltd., 98 F.3d 956 (7th Cir. 1996) .. 11
In re Montgomery County, 215 F.3d 367 (3d Cir. 2000), *cert. denied*, 121 S. Ct. 881 (2001) 16
Johnson v. Jones, 515 U.S. 304 (1995) 8, 9
Johnson v. Newburgh Enlarged School Dist., 239 F.3d 246 (2d Cir. 2001) 14
Jungquist v. Sheikh Sultan bin Khalifa Al Nahyan, 115 F.3d 1020 (D.C. Cir. 1997) 12
Kling v. Hallmark Cards, Inc., 225 F.3d 1030 (9th Cir. 2000) 18
Lauro Lines S.R.L. v. Chasser, 490 U.S. 495 (1989) 9
Lewis v. New Mexico Dept. of Health, 261 F.3d 970 (10th Cir. 2001) 19
Lloyd v. Housing Auth. of Kirksville, 58 F.3d 398 (8th Cir. 1995) 17
Malik v. Arapahoe County Dept. of Social Security, 191 F.3d 1306 (10th Cir. 1999) 19
Malik v. Brown, 71 F.3d 724 (9th Cir. 1995) 18
Mancuso v. New York State Thruway Auth., 86 F.3d 289 (2d Cir.), *cert. denied*, 519 U.S. 992 (1996) 15
Manhattan Beach Police Officers Ass'n v. City of Manhattan Beach, 881 F.2d 816 (9th Cir. 1989) 18

Cases (Continued) **Page**

Midland Asphalt Corp. v. United States, 489 U.S. 794 (1989) 9
Monge-Vasquez v. Rohena-Betancourt, 813 F.2d 22 (1st Cir. 1987) 14
Moniz v. City of Fort Lauderdale, 145 F.3d 1278 (11th Cir. 1998) 21
Nolen v. Jackson, 102 F.3d 1187 (11th Cir. 1997) 10, 21
Puerto Rico Aqueduct & Sewer Authority v. Metcalf & Eddy, Inc., 506 U.S. 139 (1993) 5
Quintana v. Anselmi, 817 F.2d 891 (1st Cir. 1987) 14
Rein v. Socialist People's Libyan Arab Jamahiriya, 162 F.3d 748 (2d Cir. 1998), *cert. denied*, 527 U.S. 1003 (1999) 12
Richardson-Merrell, Inc. v. Koller, 472 U.S. 424 (1985) ... 9
Sevier v. City of Lawrence, 60 F.3d 695 (10th Cir. 1995) .. 20
Stringfellow v. Concerned Neighbors in Action, 480 U.S. 370 (1987) 10
Summit Medical Assocs., P.C. v. Pryor, 180 F.3d 1326 (11th Cir. 1999), *cert. denied*, 529 U.S. 1012 (2000) ... 20
Swint v. Chambers County Comm'n, 514 U.S. 35 (1995) 1, 2, 6-8, 10-12
Todd v. United States, 849 F.2d 365 (9th Cir. 1988) 18
United States v. Blackwell, 900 F.2d 742 (4th Cir. 1990) ... 16
United States v. Board of School Commrs. of Indianapolis, 128 F.3d 507 (7th Cir. 1997) 11
United States v. Cambio Exacto, S.A., 166 F.3d 522 (2d Cir. 1999) 15
United States v. Marino, 200 F.3d 6 (1st Cir.), *cert. denied*, 529 U.S. 1137 (2000) 13
United States v. Stanley, 483 U.S. 669 (1987) 2, 6, 8
United States v. Yellow Freight Sys., 637 F.2d 1248 (9th Cir. 1980), *cert. denied*, 454 U.S. 815 (1981) .. 18-19
United States Fidelity & Guaranty Co. v. Braspetro Oil Services Co., 199 F.3d 94 (2d Cir. 1999) 14

Cases (Continued) **Page**

Vista Community Services v. Dean, 107 F.3d 840 (11th Cir. 1997) 21
Watkins v. City of Oakland, 145 F.3d 1087 (9th Cir. 1998) 18

Statutes **Page**

28 U.S.C. § 1254(1) 1
28 U.S.C. § 1291 1
28 U.S.C. § 1651 6

Miscellaneous **Page**

16 Wright & Miller, FEDERAL PRACTICE & PROCEDURE: JURISDICTION (2d ed. 1996) 9

PETITION FOR A WRIT OF CERTIORARI

Walter Umphrey, John M. O'Quinn, John Eddie Williams, Jr., Wayne A. Reaud, and Harold W. Nix ("Private Counsel") respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-13a) is reported at 259 F.3d 387. The opinion of the district court (Pet. App. 14a- 46a) is reported at 110 F. Supp.2d 514.

JURISDICTION

The court of appeals entered its judgment on July 23, 2001. A timely petition for rehearing was denied on August 23, 2001. Pet. App. 47a. This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

28 U.S.C. § 1291 provides in relevant part that the courts of appeals "shall have jurisdiction of appeals from all final decisions of the district courts of the United States."

STATEMENT

This case involves the doctrine of "pendent appellate jurisdiction," which some of the federal courts of appeals have used to assert appellate jurisdiction over otherwise non-appealable issues. In a series of decisions culminating in *Swint v. Chambers County Comm'n*, 514 U.S. 35 (1995), this Court imposed strict limits on the exercise of "pendent appellate jurisdiction." In this case, the Fifth Circuit has eliminated those limits by reviewing an ordinarily non-appealable interlocutory order by a federal district court denying a motion to remand to state court. The Fifth Circuit held that it possessed appellate jurisdiction over the district court's order pursuant to the collateral order doctrine of *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541, 546 (1949), due to an Eleventh Amendment

defense asserted by the State.[1] Yet in its decision the Fifth Circuit did not reach the Eleventh Amendment issue that it used to provide jurisdiction. Rather, the court of appeals held that it had appellate jurisdiction to decide a separate All Writs Act question and hold that removal was improper – without ever having to resolve the Eleventh Amendment issue.

The Fifth Circuit's decision dramatically expands appellate jurisdiction. Its decision enables an appellate court confronted with an interlocutory appeal under the collateral order doctrine to decide *virtually any dispositive issue in the case* – not simply the collateral matter conferring appellate jurisdiction. The Fifth Circuit's holding conflicts with this Court's decisions in *Swint v. Chambers County Comm'n*, 514 U.S. 35 (1995); *United States v. Stanley*, 483 U.S. 669 (1987); *Abney v. United States*, 431 U.S. 651 (1977), as well as with numerous decisions in many other circuits that have faithfully accorded a properly limited interpretation to the doctrine of "pendent appellate jurisdiction."

The issue of "pendent appellate jurisdiction" presented here is a recurring one that arises almost every time a federal court of appeals entertains an appeal under the collateral order doctrine. Thus, since 1995, the courts of appeals have cited to *Swint* nearly two hundred times. Despite this Court's decisions in *Swint* and its predecessor cases, the issue continues to vex the courts of appeals.

If the Fifth Circuit's ruling is permitted to stand, appellate jurisdiction will be broadened beyond the limits authorized by Congress. Further, because the Fifth Circuit's holding conflicts with decisions in numerous other circuits, the scope of appellate jurisdiction will vary from court to court across the nation. Accordingly, this Court's review is urgently needed.

---

[1] For purposes of this proceeding, petitioners do not challenge the assertion of Eleventh Amendment immunity. They reserve the right to do so in future proceedings.

1. Procedural History.

In March 1996, Texas retained Private Counsel to represent the State in litigation against the tobacco industry. The State agreed in a written fee agreement that Private Counsel were entitled to a 15 percent share of the State's total recovery plus reimbursement for expenses. Pet. App. 3a.

When the tobacco lawsuit was settled in January 1998, Texas urged the federal court to enter a judgment approving the settlement; to create a structure for the payment of attorneys' fees; to exercise continuing jurisdiction over the settlement and related proceedings; and to retain jurisdiction over the settlement funds. *Id.* at 2a-3a, 14a-17a. Texas also chose to submit the issue of attorneys' fees to the District Court. The court did as the State asked in every respect and approved the attorneys' fee agreement as reasonable and enforceable. *Id.* at 3a, 17a. The very first numbered paragraph of the settlement agreement between the parties, adopted as an enforceable order of the court, provides that "the State of Texas acknowledge[s] that this Court has jurisdiction over the subject matter of this action and over each of the parties hereto, and that this Court shall retain jurisdiction for the purposes of implementing and enforcing this Settlement Agreement," part of which addressed attorneys' fees. *Id.* at 2a n.1.

Private Counsel nonetheless elected to waive their rights to a full 15 percent contingency fee under their fee agreement with the State. Instead, Private Counsel agreed to accept the fee set by an arbitral award, to be paid solely by the tobacco defendants in the State of Texas' lawsuit. *Id.* at 4a. That fee was determined in an arbitration proceeding with the tobacco companies in December 1998 before a panel of expert arbitrators in a procedure ordered by the federal District Court. *Id.* at 4a, 18a.

Even though the State deliberately chose to file, litigate, and settle its tobacco suit in *federal* court, on April 27, 2000, Texas filed a bill of discovery in *state* court to investigate alleged fraud

and breach of fiduciary duty claims against Private Counsel. *Id.* at 5a, 19a-20a. The bill of discovery sought to compel Private Counsel's depositions on issues directly related to their conduct before the federal District Court. *Id.* at 3a. The bill of discovery also sought to reopen issues previously decided by the federal District Court's judgments. For example, the bill of discovery alleged that the former state Attorney General had no authority to enter the fee agreement with Private Counsel – a claim that the District Court previously rejected in approving the settlement between the State and the tobacco companies. *In re Fraser*, 75 F. Supp.2d 572, 576 n.4 (E.D. Tex. 1999), *vacated on other grounds*, Nos. 00-40024, et al. (5th Cir. July 10, 2000). Further, the bill of discovery sought confidential documents that are subject to continuing orders of the District Court. Pet. App. 41a.

The State has pursued its bill of discovery even though for more than two years Private Counsel have offered to sit voluntarily for depositions. In compliance with federal discovery rules, Private Counsel have already provided the State with a total of fifteen (15) file boxes and two (2) bankers' boxes containing the relevant documents in Private Counsel's possession relating to the claims raised by the State in its bill of discovery. They have also supplied privilege logs, an accounting of the expenses incurred in the tobacco litigation delivered to the parties to the settlement, and a list of persons who may have relevant knowledge in the case. Private Counsel have submitted five sworn statements to the Attorney General directly addressing concerns expressed in the bill of discovery regarding the handling of the Texas tobacco litigation. They have supplied the Attorney General with a comprehensive chronology of the history of the formation of the fee agreement, with accompanying documentation, and a summary of their expenses in the tobacco litigation. Private Counsel have also made available some 5,000 file boxes (containing millions of pages of documents) of relevant case-related material to the Attorney General's staff, all without any insistence that the State concede

federal court jurisdiction or take any step that might be considered to be waiver of any immunity it possesses.

2. The District Court's Decision

Private Counsel removed the bill of discovery to the United States District Court for the Eastern District of Texas. The State moved to remand, invoking the Eleventh Amendment and other grounds. The District Court denied the motion to remand, holding that removal was proper under "virtually uniform . . . precedent." Pet. App. 39a. The court noted that it had "expressly retained jurisdiction over all aspects of the settlement agreement," *id.*, and it held that this continuing jurisdiction warranted removal. The District Court explained that the State's petition "undermin[es] the court-adopted settlement." *Id.* at 40a. In addition, the District Court held that "the State's petition directly invoke[d] several provisions of the [settlement]" and would require interpretation and possible modification of prior orders issued by the District Court. *Id.* The court also held that remand was not required under the Eleventh Amendment, because the State had itself initiated the original tobacco lawsuit. *Id.* at 44a-46a.

3. The Fifth Circuit's Decision

On appeal, the Fifth Circuit reversed the District Court's judgment. The Court of Appeals began by acknowledging that, "[o]rdinarily, we have appellate jurisdiction only over final judgments, which the district court's order denying remand is not. We therefore must first address this court's authority to hear this appeal of a non-final ruling." Pet. App. 6a. The Fifth Circuit cited this Court's decision in *Puerto Rico Aqueduct & Sewer Authority v. Metcalf & Eddy, Inc.*, 506 U.S. 139, 143-45 (1993), that a State "'may take advantage of the collateral order doctrine to appeal a district court order denying a claim of Eleventh Amendment immunity.'" *Id.* (citation omitted). The Fifth Circuit held that it possessed appellate jurisdiction, "[g]iven that the denial of Texas's Eleventh Amendment immunity is a

non-frivolous issue in this case." Pet. App. 7a. The court reached that holding even though it expressly noted that it was *not* deciding the Eleventh Amendment issue that supposedly gave rise to appellate jurisdiction. *Id.* at 13a n.14. Nor did the court find that the Eleventh Amendment issue was intertwined with any other issue in the case.

On the merits, the Fifth Circuit held that the bill of discovery procedure instituted by the State was a premature basis for asserting the district court's jurisdiction to protect the settlement agreement under the All Writs Act, 28 U.S.C. § 1651. Pet. App. 12a-13a. Accordingly, the Court of Appeals held that removal was improper.

On August 23, 2001, the Fifth Circuit denied timely petitions for rehearing and rehearing en banc. Pet. App. 47a. On September 17, 2001, the Court of Appeals granted petitioners' motion to stay issuance of the mandate pending the disposition of the petition for certiorari.

REASONS FOR GRANTING THE WRIT

Under the Fifth Circuit's judgment in this case, a federal courts of appeals may invoke the collateral order doctrine as the basis for appellate jurisdiction and then proceed to reach any dispositive issue in the case – without ever deciding the collateral issue that supposedly gives rise to appellate jurisdiction in the first place. The Fifth Circuit has held that appellate jurisdiction exists without regard to whether the appealable and otherwise non-appealable issues are "inextricably intertwined" or whether review of the latter is necessary to ensure meaningful review of the former.

The Fifth Circuit's holding conflicts with this Court's decisions imposing strict limits on "pendent appellate jurisdiction" in *Swint v. Chambers County Comm'n*, 514 U.S. 35 (1995), *United States v. Stanley*, 483 U.S. 669 (1987); *Abney v. United States*, 431 U.S. 651 (1977), as well as with numerous

decisions in many other circuits that have properly followed this Court's precedent. The problem is an important and recurring one: it arises in virtually every interlocutory appeal under the collateral order doctrine. Accordingly, this Court's review is urgently needed.

A. THE FIFTH CIRCUIT'S HOLDING CONFLICTS WITH BINDING PRECEDENT OF THIS COURT

In *Swint*, a unanimous Court rejected precisely the same theory of "pendent appellate jurisdiction" (514 U.S. at 43) upon which the Fifth Circuit relied in this case. This Court held that there was no appellate jurisdiction under the collateral order rule to review the denial of a summary judgment motion even though the court of appeals "unquestionably" had jurisdiction to review the denial of separate motions denying claims of qualified immunity. *Id.* at 38. The Court explained that expanding the collateral order doctrine for pragmatic and "practical" reasons to permit appellate review of the entire case would "drift away from the statutory instructions Congress has given to control the timing of appellate proceedings." *Id.* at 45. "[C]ourts of appeals" do not have "discretion to append to a *Cohen*-authorized appeal from a collateral order further rulings of a kind neither independently appealable nor certified by the district court." *Id.* at 47. Accordingly, in *Swint* this Court expressly rejected a "'liberal' or 'flexible' approach" to appellate jurisdiction, *id.* at 47 n.5, and warned that "a rule loosely allowing pendent appellate jurisdiction would encourage parties to parlay *Cohen*-type collateral orders into multi-issue interlocutory appeal tickets." *Id.* at 49-50.

If collateral order appellate jurisdiction is to be expanded, this Court held, it must be the work of Congress or the federal rules committees, as has been the case with class certification review under Federal Rule of Civil Procedure 23. *Id.* at 48. Although this Court stated that it "need not definitively or preemptively settle here whether or when it may be proper for a court of

appeals, with jurisdiction over one ruling, to review, conjunctively, related rulings that are not themselves independently appealable," *id.* at 50-51, this Court suggested that review would extend to a related issue only when it was "inextricably intertwined with," or "necessary to ensure meaningful review of," an issue properly appealed under the collateral order doctrine. *Id.* at 51. In this case, the Fifth Circuit never suggested that the All Writs Act issue was intertwined with, or necessary to ensure meaningful review of, the Eleventh Amendment question. Indeed, the two issues could not have been intertwined, for the court of appeals was able to resolve the All Writs Act question without reaching the Eleventh Amendment issue.

Accordingly, the Fifth Circuit's judgment conflicts not only with *Swint* but also with *Abney v. United States*, 431 U.S. 651, 662-63 (1977), where this Court held that a court of appeals lacked authority to review a trial court's rejection of the defendant's challenge to the sufficiency of an indictment, even though it had appellate jurisdiction over a motion to dismiss the indictment on double jeopardy grounds. This Court explained that appellate jurisdiction did not "extend beyond the claim of formal jeopardy and encompass other claims presented to, and rejected by, the district court in passing on the accused's motion to dismiss. Rather, such claims are appealable if, and only if, they too fall within *Cohen's* collateral-order exception to the final-judgment rule." *Id.* at 663. Likewise, in *United States v. Stanley*, 483 U.S. 669 (1987), the Court held that immediate appellate review was limited to the certified order; issues presented by other, noncertified orders could not be considered simultaneously. *Id.* at 676-77. *See also Johnson v. Jones*, 515 U.S. 304, 319-20 (1995) ("a defendant, entitled to invoke a qualified-immunity defense, may not appeal a district court's summary judgment order insofar as that order determines whether or not the pretrial record sets forth a 'genuine' issue of fact for trial").

These decisions reflect this Court's repeated instruction that the class of appealable collateral orders should be restricted, not expanded. *See Johnson*, 515 U.S. at 309; *Digital Equipment Corp. v. Desktop Direct, Inc.*, 511 U.S. 863, 868 (1994); *Lauro Lines S.R.L. v. Chasser*, 490 U.S. 495, 500 (1989). As noted commentators have observed, this Court recognized in *Swint* that "opening the opportunity for expanded review may invite frequent extensive briefing and argument of issues that should not be reviewed because review would substantially increase the danger of untoward interference with a continuing trial process." 16 Wright & Miller, FEDERAL PRACTICE & PROCEDURE: JURISDICTION § 3937, at 696 (2d ed. 1996).

The Fifth Circuit's decision runs afoul of the important policies served by the final judgment rule, which descends from the Judiciary Act of 1789, where "the First Congress established the principle that only 'final judgments and decrees' of the federal district courts may be reviewed on appeal." *Midland Asphalt Corp. v. United States*, 489 U.S. 794, 798 (1989). "[T]he final judgment serves several salutary purposes." *Cunningham v. Hamilton County*, 527 U.S. 198, 203 (1999). The rule prevents the repeated interruption of district court proceedings, enabling the orderly and effective conduct of a trial and the full development of a record for subsequent review. *See Richardson-Merrell, Inc. v. Koller*, 472 U.S. 424, 430 (1985); *Firestone Tire & Rubber Co. v. Risjord*, 449 U.S. 368, 374 (1981) ("Permitting piecemeal appeals would undermine the independence of the district judge, as well as the special role that individual plays in our judicial system."). "Since the right to a judgment from more than one court is a matter of grace and not a necessary ingredient of justice, Congress from the very beginning has, by forbidding piecemeal disposition on appeal of what for practical purposes is a single controversy, set itself against enfeebling judicial administration. . . . To be effective, judicial administration must not be leaden footed. Its moment would be arrested by permitting separate review of the

component elements in a unified cause. Limits on appellate jurisdiction serve the salutary goal of making sure the trial court is finished with the case before an appellate court steps in." *Cobbledick v. United States*, 309 U.S. 323, 325 (1940).

The final judgment rule also protects the courts of appeals from being burdened with the immediate consideration of issues which might later be rendered moot, either because the party who lost the ruling prevails on the merits or because the issue fails to affect the final judgment in a manner warranting reversal. *Stringfellow v. Concerned Neighbors in Action*, 480 U.S. 370, 380 (1987). And it reduces the ability of parties to "clog the courts through a succession of costly and time-consuming appeals." *Flanagan v. United States*, 465 U.S. 259, 264 (1984).

The Fifth Circuit's decision conflicts with all of these principles.

B. THE FIFTH CIRCUIT'S HOLDING CONFLICTS WITH DECISIONS IN OTHER CIRCUITS

This Court should grant review to clarify the contours of the doctrine of pendent appellate jurisdiction, which continues to cause considerable confusion in the lower courts. The question of pendent appellate jurisdiction is an important and recurring one. For example, the courts of appeals have cited to this Court's decision in *Swint* on nearly two hundred occasions since 1995. Yet the courts of appeals have continued to express confusion and sharp disagreement over the implications of that decision. The Fourth Circuit, for example, has commented that its "ability to exercise pendent jurisdiction has come into question" and that *Swint* "makes it 'unclear whether an appellate court has any "pendent appellate jurisdiction."'" *Hoechst Diafoil Co. v. Nan Ya Plastics Corp.*, 174 F.3d 411, 416 (4th Cir. 1999) (citations omitted). The Eleventh Circuit has similarly explained that "the existence of pendent issue appellate jurisdiction is uncertain in the wake of *Swint*." *Nolen v. Jackson*, 102 F.3d 1187, 1189 (11th Cir. 1997).

Judge Posner has described the doctrine of pendent appellate jurisdiction as "controversial and embattled." *United States v. Board of School Commrs. of Indianapolis*, 128 F.3d 507, 510 (7th Cir. 1997). He has also observed that the entire doctrine "hangs by a thread" after this Court in *Swint* "expressed profound skepticism concerning judge-created doctrines of appellate jurisdiction," *In the Matter of Rimsat, Ltd.*, 98 F.3d 956, 964 (7th Cir. 1996), and that "the continued validity and scope of the doctrine have been thrown into doubt by the Supreme Court's decision in *Swint*." *IDS Life Ins. Co. v. SunAmerica, Inc.*, 103 F.3d 524, 528 (7th Cir. 1996).

In this case, the Fifth Circuit has adopted an expansive and permissive view of pendent appellate jurisdiction, and its decision is an excellent vehicle for further clarifying the doctrine. The Fifth Circuit held that there was appellate jurisdiction over the All Writs Act issue in the case at bar – without regard to whether the Eleventh Amendment and All Writs Act questions were "intertwined" or whether review of the latter was necessary to ensure meaningful review of the former. Further, the Fifth Circuit held that there was appellate jurisdiction even though it declined to decide the appealable Eleventh Amendment question. Had the All Writs Act and Eleventh Amendment questions been intertwined, the Fifth Court would have found it necessary to decide both of them.

The need for this Court's review is heightened by the fact that the Fifth Circuit is not the only court to have adopted a broad view of pendent appellate jurisdiction. The D.C. Circuit, for example, has opined that "inextricably intertwined" and "necessary to ensure meaningful review" should not be considered "a definitive or exhaustive list of conditions" under which *Swint* permits the exercise of pendent appellate jurisdiction. *Gilda Marx, Inc. v. Wildwood Exercise, Inc.*, 85 F.3d 675, 679 n.4 (D.C. Cir. 1996) (per curiam). The D.C. Circuit has held that an appellate court has discretion to exercise pendent jurisdiction on interlocutory appeals when doing so

would serve the "interests of fairness and efficiency." *Jungquist v. Sheikh Sultan bin Khalifa Al Nahyan*, 115 F.3d 1020, 1027 (D.C. Cir. 1997). The D.C. Circuit has indicated that such pendent jurisdiction may exist even over issues that are not inextricably intertwined with issues that formed the basis for permissible interlocutory review. *Id.*

The other circuits, however, have taken a narrower approach to pendent appellate jurisdiction. The Second Circuit, for example, has held that it applies the doctrine of pendent appellant jurisdiction "restrictively" and that "[m]ost of our sister circuits have also adopted a restrictive understanding of the exceptions to *Swint's* general rule." *Rein v. Socialist People's Libyan Arab Jamahiriya*, 162 F.3d 748, 758 (2d Cir. 1998), *cert. denied*, 527 U.S. 1003 (1999). The Second Circuit commented that the D.C. Circuit "has given *Swint* a more permissive reading" and that "[w]e believe that the D.C. Circuit misinterpreted *Swint*." *Id.* Accordingly, the Second Circuit articulated a rule that squarely conflicts with the holding of the Fifth Circuit in this case: "we hold that when a party takes an interlocutory appeal under the collateral order exception, and that party or any other party seeks simultaneous consideration of another issue that is not independently entitled to interlocutory review, we may not, under *Swint*, take jurisdiction over the latter issue unless it is inextricably intertwined with, or – what is essentially the same thing – its review is necessary to ensure meaningful review of, the former issue. We further hold that this remains the case even if considerations of efficiency argue for deciding both issues on interlocutory review." *Id.* at 758-59.

Similarly, the Sixth Circuit has explicitly rejected the Fifth Circuit's interpretation of pendent appellate jurisdiction:

> *Swint* intended to restrict discretionary appellate jurisdiction, rather to expand it. The Court did not intend to enlarge the already narrow categories of interlocutory appeals when it stated that nonappealable questions may

> be addressed if they are "inextricably intertwined" with the issue that *is* appealable. Given the extent to which the Court engaged in a more thorough explanation of the limited nature of appellate jurisdiction, the "inextricably intertwined" requirement was not meant to be loosely applied as a matter of discretion. Rather, the terms can only be understood, in the context of the opinion, to mean that pendent jurisdiction *may* be exercised only when the immunity issues absolutely cannot be resolved without addressing the nonappealable collateral issues. To read *Swint* otherwise is effectively to undercut the rule it established, and which in turn rests upon the permissible bounds of a federal court's appellate powers.

Archie v. Lanier, 95 F.3d 438, 443 (6th Cir. 1996).

The Fifth Circuit's decision conflicts with numerous decisions in other circuits holding that, under *Swint*, pendent appellate jurisdiction is proper only if (1) the appealable question is actually decided by the court, and (2) the otherwise unappealable issue is inextricably intertwined with the appealable one or review of the otherwise unappealable issue is necessary to ensure meaningful review of the appealable one. By repudiating both of these requirements for pendent appellate jurisdiction, the Fifth Circuit has illuminated a sharp circuit conflict:

First Circuit

Acevedo-Garcia v. Vera-Monroig, 204 F.3d 1, 13-14 (1st Cir. 2000) (applying *Swint* to hold that interlocutory review of immunity defenses asserted by individual officers did not give court of appeals jurisdiction over denial of summary judgment to municipality);

United States v. Marino, 200 F.3d 6, 12-13 (1st Cir.), *cert. denied*, 529 U.S. 1137 (2000) (applying *Swint* to hold that interlocutory review of denial of motion to dismiss criminal

prosecution did not provide jurisdiction of denial of motion in limine: "the Supreme Court placed severe constraints on the exercise of the type of pendent jurisdiction. . . . As the Ciampi appeal from the denial of the motion in limine is not intertwined with appellants' joint appeal, we discern no sound basis for exercising pendent jurisdiction.");

Quintana v. Anselmi, 817 F.2d 891, 892 n.3 (1st Cir. 1987) (refusing to consider appropriateness of injunctive relief along with qualified immunity appeal);

Monge-Vasquez v. Rohena-Betancourt, 813 F.2d 22, 23 n.1 (1st Cir. 1987) (same).

Second Circuit

Johnson v. Newburgh Enlarged School Dist., 239 F.3d 246, 255-56 (2d Cir. 2001) (holding that interlocutory appeal over denial of qualified immunity defenses did not confer appellate jurisdiction over statutory claim because the issues were not "inextricably intertwined");

United States Fidelity & Guaranty Co. v. Braspetro Oil Services Co., 199 F.3d 94, 97 (2d Cir. 1999) (holding that collateral order appeal of immunity claim under Foreign Sovereign Immunities Act did not confer pendent appellate jurisdiction over motions to dismiss for improper forum because "the question of whether or not the district court properly denied appellants' motion to dismiss for improper forum, either based on forum-selection clauses or on the doctrine of forum non conveniens, has little or nothing in common with the question of subject matter jurisdiction under the FSIA. Appellants do not explain how these two inquiries are inextricably intertwined or how review of the former is necessary to meaningful review of the latter. As a result, we may not entertain appellants' challenges to the district court's forum-related findings on an interlocutory basis.");

Davidson v. Chestnut, 193 F.3d 144, 151 (2d Cir. 1999)

(holding that interlocutory appeal on immunity issues did not confer pendent appellate jurisdiction regarding other matters: "In the course of reviewing an immediately appealable interlocutory ruling, we may review a related ruling that is unappealable in its own right if, and only if, 'the otherwise unappealable issue is inextricably intertwined with the appealable one, or . . . review of the otherwise unappealable issue is necessary to ensure meaningful review of the appealable one.'") (citation omitted);

United States v. Cambio Exacto, S.A., 166 F.3d 522, 529 (2d Cir. 1999) (holding that denial of motion to dismiss and for summary judgment was not appealable under pendent jurisdiction: "Nor are the factors relevant to the order so 'inextricably intertwined' with the [appealable issue] or . . . 'necessary to ensure meaningful review' of that issue") (brackets and ellipsis in original);

Ierardi v. Sisco, 119 F.3d 183, 188 (2d Cir. 1997) (holding pendent appellate jurisdiction unavailable where "the question of whether [plaintiff] may pursue a claim against [defendant] pursuant to [one state statute] is neither inextricably intertwined with, nor necessary to the resolution of, the appropriate reach [of another statute]");

Mancuso v. New York State Thruway Auth., 86 F.3d 289, 292 (2d Cir.), *cert. denied*, 519 U.S. 992 (1996) (holding that appeal of Eleventh Amendment immunity under collateral order doctrine did not provide appellate jurisdiction to review other defenses and issues because "the Thruway Authority's additional state law defenses are neither inextricably intertwined with, nor necessary to the resolution of, its immunity claims");

Third Circuit

E.I. DuPont de Nemours & Co. v. Rhone Poulenc Fiber & Resin Intermediates, S.A.S., 2001 WL 1229797, *13 (3d Cir. Oct. 15, 2001) (finding no appellate jurisdiction over personal jurisdiction issue and holding that "'the [pendent appellate

jurisdiction] doctrine should be used sparingly, and only where there is a sufficient overlap in the facts relevant to both the appealable and nonappealable issues to warrant plenary reivew.' . . . Essentially, post-*Swint*, we have defined pendent appellate jurisdiction to mirror the Supreme Court's two examples: inextricably intertwined orders or review of the non-appealable order where it is necessary to ensure meaningful review of the appealable order.") (citation omitted);

In re Montgomery County, 215 F.3d 367, 375-76 (3d Cir. 2000), *cert. denied*, 121 S. Ct. 881 (2001) ("'[P]endent appellate jurisdiction over an otherwise unappealable order is available only to the extent necessary to ensure meaningful review of an appealable order.' . . . Appellants' immunity claims are entirely susceptible to meaningful review without any consideration of their non-immunity claims. Accordingly, we decline to exercise pendent appellate jurisdiction over the non-immunity claims.") (citation omitted);

Carver v. Foerster, 102 F.3d 96, 101 n.4 (3d Cir. 1996) ("we do not think the causation issue . . . is 'inextricably intertwined' with the immunity question . . . The Supreme Court does not take the exercise of 'pendent' appellate jurisdiction lightly");

Fourth Circuit

United States v. Blackwell, 900 F.2d 742, 746-47 (4th Cir. 1990) (declining to review, in context of double jeopardy appeal, orders denying motions to dismiss indictment on grounds of improper venue and impermissible forum shopping);

Sixth Circuit

Archie v. Lanier, 95 F.3d 438, 443 (6th Cir. 1996) ("We conclude that we have no appellate jurisdiction to review the partial denial of Lanier's motion to dismiss because the merits of plaintiffs' claim are neither 'inextricably intertwined' with the question of immunity, nor does review of the former ensure a meaningful review of the latter.");

Seventh Circuit

Cherry v. University of Wisconsin Sys. Bd. of Regents, 2001 WL 1028282, *2 (7th Cir. Sept. 7, 2001) (Eleventh Amendment appeal did not confer pendent jurisdiction over statutory issues: "In line with this court's reluctance to exercise pendent appellate jurisdiction over additional issues in a collateral appeal, we decline to exercise such jurisdiction in this case.");

Eighth Circuit

Entergy, Arkansas, Inc. v. Nebraska, 241 F.3d 979, 987 (8th Cir.), *cert. denied*, 70 U.S.L.W. 3240 (U.S. Oct. 1, 2001) ("An issue is 'inextricably intertwined' with properly presented issues 'only if it is coterminous with, or subsumed in, the claim before the court on interlocutory appeal – that is, when the appellate resolution of the collateral appeal necessarily resolves the pendent claims as well.'") (citation omitted);

Eagle v. Morgan, 88 F.3d 620, 629 (8th Cir. 1996) (applying *Swint* to hold that court of appeals lacked appellate jurisdiction over denial of summary judgment on state-law issue because it was not "inextricably intertwined" with interlocutory review of qualified immunity claim);

Lloyd v. Housing Auth. of Kirksville, 58 F.3d 398, 400 (8th Cir. 1995) (same);

Ninth Circuit

Cunningham v. Gates, 229 F.3d 1271, 1284-85 (9th Cir. 2000) ("We have consistently interpreted 'inextricably intertwined' very narrowly. . . . Two issues are not 'inextricably intertwined' if we must apply different legal standards to each issue. Rather, the legal theories on which the issues advance must either (a) be so intertwined that we must decide the pendent issue in order to review the claims properly raised on interlocutory appeal, or (b) resolution of the issue properly raised on interlocutory appeal necessarily resolves the pendent issue.") (citation omitted);

Kling v. Hallmark Cards, Inc., 225 F.3d 1030, 1042 (9th Cir. 2000) ("Because the defendants' argument for limited damages is not 'inextricably intertwined' with the laches defense on which they succeeded below, pendent appellate jurisdiction does not apply.");

Watkins v. City of Oakland, 145 F.3d 1087, 1092 (9th Cir. 1998) (denying pendent appellant jurisdiction under *Swint* because "[w]e do not find the district court's denial of summary judgment to Oakland inextricably intertwined with the denial of qualified immunity to [the individual defendants]");

California v. Campbell, 138 F.3d 772, 778 (9th Cir.), *cert. denied*, 525 U.S. 822 (1998) ("Given the Supreme Court's criticism of pendent appellate jurisdiction, the Court's 'inextricably intertwined' exception should be narrowly construed. Under such a construction, the CERCLA order is not inextricably intertwined with the injunction. . . . We can easily address the defendants' state law liability without discussing the defendants' CERCLA liability. Just because the same facts are involved in both issues does not make the two issues inextricably intertwined.");

Malik v. Brown, 71 F.3d 724, 727 (9th Cir. 1995) ("A denial of qualified immunity is appealable immediately. The denial of summary judgment as to prospective relief, however, is not a final order and is not inextricably intertwined with the issue of qualified immunity. We have no appellate jurisdiction to review it.") (citing *Swint*);

Manhattan Beach Police Officers Ass'n v. City of Manhattan Beach, 881 F.2d 816, 817-18 (9th Cir. 1989) (scope of review limited to issue of immunity);

Todd v. United States, 849 F.2d 365, 368 (9th Cir. 1988) (same);

United States v. Yellow Freight Sys., 637 F.2d 1248, 1251 (9th Cir. 1980) ("Inquiry into the immediate appealability of a

particular pretrial order must focus upon each claim asserted. Thus immediate appealability of one of the defendants' claims will not confer pendent appellate jurisdiction over defendants' other claims.") (citing *Abney*), *cert. denied*, 454 U.S. 815 (1981);

Tenth Circuit

Lewis v. New Mexico Dept. of Health, 261 F.3d 970, 978 (10th Cir. 2001) (holding that interlocutory appeal of Eleventh Amendment question did not confer pendent appellate jurisdiction over Fed. R. Civ. P. 12(b)(6) issues: "We have interpreted the Supreme Court's discussion of pendent jurisdiction in *Swint* to permit pendent appellate jurisdiction 'only when the otherwise nonappealable decision is "inextricably intertwined" with the appealable decision, or where review of the nonappealable decision is necessary to ensure meaningful review of the appealable decision.' In order for a nonappealable, or pendent, decision to be inextricably intertwined with an appealable decision, 'the pendent claim [must be] coterminous with or subsumed in the properly appealable claim – that is, when resolution of the properly appealable claim necessarily resolves the pendent claim.' In addition to recognizing that the discretionary exercise of pendent appellate jurisdiction 'is generally disfavored,' we have noted that the Supreme Court has discouraged appellate courts from exercising pendent jurisdiction over otherwise interlocutory appeals.") (citations omitted; brackets in original);

Malik v. Arapahoe County Dept. of Social Security, 191 F.3d 1306, 1316 (10th Cir. 1999) (holding that interlocutory appeal of immunity issue did not confer pendent appellate jurisdiction over claims relating to hearsay evidence, outrageous conduct cause of action, and attorney's fees because "the term 'inextricably intertwined' refers only to cases in which 'the pendent claim is coterminous with, or subsumed in, the claim before the court on interlocutory appeal – that is, when the appellate resolution of the collateral appeal *necessarily* resolves the pendent claim as

well'") (citation omitted and emphasis in original);

Foote v. Spiegel, 118 F.3d 1416, 1423 (10th Cir. 1997) (holding that pendent appellate jurisdiction was lacking because "resolution of the properly appealable issues – the appealable portion of the denial of qualified immunity . . . – will not necessarily resolve Foote's claims that the district court erred in denying summary judgment");

Garramone v. Romo, 94 F.3d 1446, 1452 (10th Cir. 1996) (no pendent appellate jurisdiction because Eleventh Amendment immunity issue was not inextricably intertwined with res judicata and collateral estoppel issues);

Sevier v. City of Lawrence, 60 F.3d 695, 701 (10th Cir. 1995) (holding that, under *Swint*, interlocutory appeal of immunity issue did not confer pendent appellate jurisdiction over denial of summary judgment on state law claim for tort of outrage because "it is unlikely that the issues presented would be coterminous with those raised by the state law outrage claim").

Eleventh Circuit

Hinson v. Edmond, 205 F.3d 1264, 1265 (11th Cir. 2000) (finding no pendent appellate jurisdiction because immunity issues were not inextricably intertwined with Eighth Amendment claim);

Summit Medical Assocs., P.C. v. Pryor, 180 F.3d 1326, 1335 (11th Cir. 1999), *cert. denied*, 529 U.S. 1012 (2000) (holding that appeal of denial of Eleventh Amendment immunity did not confer pendent appellate jurisdiction over standing question: "[W]e may exercise jurisdiction over standing *only* if standing and Eleventh Amendment immunity are either inextricably intertwined or the determination of one is essential to the resolution of the other. . . . [W]e may resolve the Eleventh Amendment immunity issue here without reaching the merits of standing. These issues are neither 'inextricably intertwined' nor 'necessary to ensure meaningful review' of one another.")

(emphasis in original);

Moniz v. City of Fort Lauderdale, 145 F.3d 1278, 1281 n.3 (11th Cir. 1998) ("Because we may resolve the qualified immunity issue in this case without reaching the merits of appellants' challenge to Moniz's standing, . . . we conclude that the latter issue does not come under either of these categories and thus does not fall within our pendent appellate jurisdiction under *Swint*");

Foy v. Schantz, Schatzman & Aaronson, 108 F.3d 1347, 1350 (11th Cir. 1997) ("because the jurisdictional facts are in no way related, let alone 'inextricably interwoven,' with the facts underlying the merits of the case, our pendent appellate jurisdiction cannot support our review of the motion to dismiss");

Vista Community Services v. Dean, 107 F.3d 840, 843 (11th Cir. 1997) (finding no pendent appellate jurisdiction because immunity issue was not inextricably intertwined with res judicata question);

Harris v. Board of Educ. of Atlanta, 105 F.3d 591, 595 (11th Cir. 1997) (applying *Swint* to hold that "we may resolve the qualified immunity issue without reaching the merits of the remaining questions raised by the individual defendants. Those issues are not, therefore, sufficiently interwoven with qualified immunity to fall within the court's pendent appellate jurisdiction.");

Nolen v. Jackson, 102 F.3d 1187, 1189 (11th Cir. 1997) (holding no pendent appellate jurisdiction even where "the merits of other claims [were] logically related to the qualified immunity issue");

Haney v. City of Cumming, 69 F.3d 1098, 1102 & n.6 (11th Cir. 1995), *cert. denied*, 517 U.S. 1209 (1996) (applying *Swint* to hold that appeal of immunity claims did not confer jurisdiction over summary judgment issues).

The Fifth Circuit's decision conflicts with all of these holdings in other circuits. There is a compelling need for national uniformity on basic principles of appellate jurisdiction. Similarly situated cases in the district courts should not receive disparate appellate treatment depending on where they are filed. Accordingly, this Court's review is urgently required.

CONCLUSION

The petition for certiorari should be granted.

Respectfully submitted.

GRANT KAISER
KAISER & MORRISON, P.L.L.C.
440 Louisiana, Suite 1440
Houston, TX 77002-1634
(713) 223-0000

JONATHAN S. MASSEY
JONATHAN S. MASSEY, P.C.
3920 Northampton St., N.W.
Washington, D.C. 20015
(202) 686-0457

MICHAEL TIGAR
Counsel of Record
THE TIGAR LAW FIRM
1155 Conn. Ave., N.W.
Suite 400
Washington, D.C. 20036
(202) 467-8583

November 2001

Counsel for Petitioners

APPENDIX A

No. 00-40999

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

STATE OF TEXAS,
Petitioner-Appellant,

v.

REAL PARTIES In Interest,
Including Walter Umphrey, John O'Quinn,
John Eddie Williams, Wayne Reaud and
Harold Nix, Respondents-Appellees.

July 23, 2001

Before GARWOOD, JOLLY, and DeMOSS, Circuit Judges.

E. GRADY JOLLY, Circuit Judge:

The district court entered a final judgment, incorporating a settlement agreement that supposedly ended the litigation between the State of Texas and the tobacco industry. It should have been expected that, when attorney's fees are in the billions, a string of disputes would follow. This appeal arises from the post-settlement controversy questioning the legitimacy of the contingency fees awarded to counsel representing the state ("Private Counsel"). Texas instituted this pre-litigation discovery proceeding in state court for the purpose of investigating possible fraud and breach of fiduciary duty claims against Private Counsel. Private Counsel removed the action to federal court, claiming federal jurisdiction on the basis of the settlement agreement and further arguing that the All Writs Act, 28 U.S.C. § 1651, was applicable to protect the integrity of the court's judgment from a collateral assault. Texas moved to remand, asserting, inter alia, the absence of federal jurisdiction based on

the Eleventh Amendment. The district court, concluding that Texas had submitted itself to the jurisdiction of the federal court, denied the motion and Texas has appealed. We find no basis in this case for removal jurisdiction under the All Writs Act. We further conclude that the Texas Rule 202 discovery proceeding presents a premature basis for asserting the district court's jurisdiction to protect the settlement agreement. We therefore reverse with instructions to remand this action to the state court from whence it came.

I.

Taking a cue from sister states that targeted the tobacco industry, the State of Texas hired Private Counsel to file suit in federal court against several tobacco companies to recover medical costs and other expenditures associated with tobacco use. *See Texas v. American Tobacco Co.*, No. 5:96-CV-91 (E.D.Tex. 1996). Suit was filed in March 1996. After 18 months of pre-trial activities, the State and the tobacco companies entered into a Comprehensive Settlement and Release Agreement in January 1998. Under the settlement, Texas agreed to dismiss its claims and the tobacco companies agreed to pay $15.3 billion in damages. The district court entered a final judgment incorporating prior orders. The paragraphs relevant to this appeal state that the district court would retain exclusive jurisdiction over the provisions of the settlement and final judgment.[1] The final judgment specifically stated that all persons "who seek to raise any objections or challenges in any forum to

---

[1] The first paragraph of the comprehensive settlement states:

Settling Defendants and the State of Texas acknowledge that this Court has jurisdiction over the subject matter of this action and over each of the parties hereto, and this Court shall retain jurisdiction for the purposes of implementing and enforcing this Settlement Agreement. The parties hereto agree to present any disputes under this Settlement Agreement, including without limitation any claims for breach or enforcement of this Settlement Agreement, exclusively to this Court.

any provision of this judgment are hereby enjoined from proceeding in any other state or federal court." The settlement agreement also stated that "the settlement negotiations resulting in this Settlement Agreement have been undertaken by the parties hereto in good faith." Finally, the settlement provided for the payment of attorney's fees by the defendants to Private Counsel upon presentation of Private Counsel's estimate of reasonable costs and expenses.[2] Ruling on Private Counsel's motion for approval of their attorney's fees, the district court determined that the 15 percent contingency fee – provided for by contract between the Attorney General and Private Counsel at the outset of the litigation and totaling $2.3 billion – was reasonable.

Thereafter, on January 30, 1998, several Texas legislators filed a mandamus action in Texas state court, which was removed by Private Counsel and then-Attorney General Dan Morales to federal court. This mandamus action challenged Morales's authority to bind the State to a contingency arrangement. Once removed to federal court, the legislators asserted that the fee agreement dispute could not be heard by the federal court because of Texas's Eleventh Amendment immunity.[3] *See In re Senator Troy Fraser*, No. 5:98-CV-45 (E.D. Tex 1998).

In June 1998, the parties to the fee arrangement dispute

---

[2] That portion of the settlement agreement reads:

Settling Defendants will reimburse . . . Private Counsel for reasonable costs and expenses incurred in connection with this litigation. . . . In addition, within 30 days after the date of this Settlement Agreement, Settling Defendants shall . . . pay to [Private Counsel] an amount equivalent to Private Counsel's best estimate of their reasonable costs and expenses. . . . Private Counsel shall provide Settling Defendants with an approximately documented statement of their costs and expenses.

[3] Then-Governor George W. Bush also intervened to challenge the contingency fee arrangement and the district court's jurisdiction under the Eleventh Amendment.

reached a Severance and Standstill Agreement. The agreement gave Private Counsel the choice of either attempting to enforce the original contingency fee arrangement or accepting a fee to be determined by an arbitration panel. The agreement, adopted by the court, severed the fee dispute from the tobacco litigation. *See In re Private Counsel Fee Agreement*, No. 5:98-CV-270 (E.D. Tex. 1998).

In December 1998, the arbitration panel upped the ante when it awarded Private Counsel nearly $ 3.3 billion in fees. In the meantime, the Texas political stage was being rearranged. The following month, before Private Counsel had accepted the panel's award, the new Texas Attorney General, John Cornyn, moved to dismiss *In re Private Counsel* and moved to remand *In re Fraser* based on the State's Eleventh Amendment immunity.[4] On November 5, 1999, the district court ruled on several outstanding motions and issued a memorandum opinion. *See In re Fraser*, 75 F. Supp. 2d 572 (E.D. Tex. Nov. 5, 1999). The court denied the State's motion to dismiss and the legislators' motion to remand, finding that Texas waived its Eleventh Amendment immunity from claims regarding the attorney's fees agreement by filing the initial tobacco litigation in federal court. *See also In re Private Counsel*, 1999 U.S. Dist. LEXIS 20882, 1999 WL 1022131 (E.D. Tex. Nov. 5, 1999).

Two weeks later, Private Counsel deftly elected to accept the arbitration award and, under the agreement, waived their right to sue under the initial fee arrangement. Texas soon appealed the district court's November 5 jurisdictional rulings to the Fifth Circuit, and this court granted Private Counsel's motion to dismiss for mootness and vacated the district court's underlying jurisdictional decisions. *Fraser v. Real Parties*, Nos. 00-40024, 00-40036, 00-40038 (5th Cir. July 10, 2000).

---

[4] Texas asserts that Cornyn also initiated an investigation into the fiduciary conduct of Private Counsel during the tobacco litigation at this time.

On April 27, 2000, the State filed the instant Rule 202 proceeding[5] in state court seeking to depose Private Counsel to "investigate potential claims it believes it may possess for conversion and breach of fiduciary duty."[6] Private Counsel immediately removed the action to federal court and filed a motion for summary judgment.[7] Texas filed an emergency motion to remand, arguing that the Eleventh Amendment barred adjudication of the Rule 202 proceeding in federal court. On August 15, 2000, the district court, in a very thorough and well-considered opinion, denied the motion to remand and, treating the case as removed from state court, found specifically that (a) the Rule 202 proceeding was a "civil action" for removal purposes under 28 U.S.C. § 1441; (b) the issues in the petition, however, were not supplemental or ancillary to the tobacco

---

[5] Rule 202 allows a party to petition a state court for depositions in order to investigate potential claims. It reads:

A person may petition the court for an order authorizing the taking of a deposition on oral examination or written questions either:

(a) to perpetuate or obtain the person's own testimony or that of any other person for use in an anticipated suit; or

(b) to investigate a potential claim or suit.

Tex. R. Civ. P. 202.1.

[6] Specifically, the State sought to discover whether Private Counsel should have known that the fee agreement was unenforceable, whether Private Counsel improperly sought to benefit themselves at the State's expense, whether tobacco litigation documents were withheld from the State, and whether documentation supports the expenditure of $40 million in legal expenses on the case.

[7] Because removal is properly accomplished under 28 U.S.C. § 1441, and because the district court did not base its denial of the State's motion to remand on provisions of that statute, the Rule 202 proceeding was not actually "removed" in any procedurally cognizable way. Nevertheless, we use the term "removal" to describe the assertion of federal jurisdiction over this case for the sake of clarity.

litigation;[8] (c) but nevertheless the court could exercise jurisdiction over the Rule 202 petition under the All Writs Act, 28 U.S.C. § 1651, to protect its judgment; because, inter alia, (d) the Eleventh Amendment was no bar to the proceeding because the State had waived its immunity as to the tobacco litigation and "all of its outgrowths." The district court therefore denied Texas's motion to remand. This appeal of the order denying the remand followed.

II

Ordinarily, we have appellate jurisdiction only over final judgments, which the district court's order denying remand is not. We therefore must first address this court's authority to hear this appeal of a non-final ruling. Private Counsel argues that we lack jurisdiction over this appeal because a district court's remand order is not appealable. *B., Inc. v. Miller Brewing Co.*, 663 F.2d 545, 548 (5th Cir. 1981) ("Ordinarily, a district court's refusal to remand an action is not in and of itself a final order and cannot be reviewed unless and until a final judgment has been entered."). However, the Supreme Court held in *Puerto Rico Aqueduct & Sewer Authority v. Metcalf & Eddy, Inc.*, 506 U.S. 139, 143-45 (1993), that States "may take advantage of the

---

[8] While "the doctrine of ancillary jurisdiction can hardly be criticized for being overly rigid or precise," *Kokkonen v Guardian Life Insurance Co.*, 511 U.S. 375, 379 (1994), the district court properly refused to assert ancillary jurisdiction over the Rule 202 proceeding. In a case like this, the exercise of ancillary jurisdiction over a claim with no independent basis for jurisdiction is improper "once judgment [is] entered in the original [suit]." *Peacock v. Thomas*, 516 U.S. 349, 355 (1996). Some cases suggest, however, that ancillary jurisdiction could exist over a subsequent claim when a federal court expressly retains jurisdiction over a final judgment or settlement agreement and the two claims are "factually interdependent" or the subsequent state court action would "effectively nullify" the federal judgment. *Kokkonen*, 511 U.S. at 379; *Royal Ins. Co. of America v. Quinn-L Capital Corp.*, 960 F.2d 1286, 1292 (5th Cir. 1992). However, as explained in this opinion, the Rule 202 proceeding is not factually interdependent with the original tobacco litigation and does not threaten to "effectively nullify" the federal settlement.

collateral order doctrine to appeal a district court order denying a claim of Eleventh Amendment immunity." Given that the denial of Texas's Eleventh Amendment immunity is a non-frivolous issue in this case, *Puerto Rico Aqueduct* fully supports this court's jurisdiction over the present appeal.

With appellate jurisdiction established, we now turn to address the primary jurisdictional inquiry in this appeal: whether the district court erred by exercising removal jurisdiction over this state court action under the All Writs Act.

III

The All Writs Act, 28 U.S.C. § 1651 (a), provides:

> The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.

After acknowledging that it could not assert supplemental or ancillary jurisdiction over the Rule 202 proceeding, the district court found that the All Writs Act authorized it to assert jurisdiction over the Rule 202 state proceeding, despite no independent basis for federal jurisdiction over that proceeding. The court reasoned that, particularly because it had retained jurisdiction over the settlement agreement, it could assert its jurisdiction under the All Writs Act in order to protect and effectuate its final judgment, which incorporated the settlement agreement. The State of Texas, however, argues that the All Writs Act can provide no removal jurisdiction over a matter not otherwise removable and, even if it could, the Rule 202 petition is a separate and distinct proceeding from the original tobacco litigation and in no way threatens the settlement agreement.

Although the Supreme Court has held that the All Writs Act may authorize a court to issue commands "as may be necessary or appropriate to effectuate and prevent the frustration of orders it has previously issued in its exercise of jurisdiction otherwise

obtained," *United States v. New York Telephone*, 434 U.S. 159, 172 (1977), almost 200 years of Supreme Court precedent establishes that the Act, originally enacted as part of the Judiciary Act of 1789, cannot serve as an independent basis of jurisdiction. *See, e.g., Clinton v. Goldsmith*, 526 U.S. 529, 534-35 (1999); *Rosenbaum v. Bauer*, 120 U.S. 450, 458 (1887); *M'Intire v. Wood*, 11 U.S. (Cranch) 504, 506 (1813). Accordingly, this court has similarly held that "section 1651(a) is not an independent grant of jurisdiction." *In re McBryde*, 117 F.3d 208, 220 (5th Cir. 1997). Considering these hoary precedents of the Supreme Court, some circuits have come to the conclusion that § 1651 may not be used as a removal statute to allow a federal court to assert jurisdiction over a purely state court action. These circuits have applied the Act to enjoin state court proceedings when those state actions threatened to disrupt prior orders of the court but have refused to authorize "removal" under the Act. *See Pacheco de Perez v. AT&T Co.*, 139 F.3d 1368, 1379-80 (11th Cir. 1998); *Hillman v. Webley*, 115 F.3d 1461, 1468 (10th Cir. 1997); *Westinghouse Electric Corp. v. Newman & Holtzinger, P.C.*, 992 F.2d 932, 937 (9th Cir. 1993); *Telecommunications Research and Action Ctr. v. FCC*, 242 U.S. App. D.C. 222, 750 F.2d 70, 76 (D.C. Cir. 1984) (citation omitted) (finding that, while the Act is not an independent source of jurisdiction, it can be utilized in a mandamus action to "aid" a court if it has jurisdiction over a "past, present, or future" action).[9] Several of these courts have held that, when a federal court has jurisdiction over an action, the All Writs Act grants jurisdiction to issue writs "necessary or appropriate in aid of" that jurisdiction. Such power would permit a district court to enjoin actions in state court but only where necessary to prevent relitigation of an existing federal judgment or otherwise to protect federal court orders.

---

[9] While none of these circuits has yet to authorize removal under the All Writs Act, only the Tenth Circuit has categorically held that the Act can never facilitate removal, regardless of the circumstances.

On the other hand, some courts have given the All Writs Act a considerably more expansive reading to permit removal of a state court action to the federal court for adjudication even though the action was otherwise non-removable. *See, e.g., NAACP v. Metropolitan Council*, 144 F.3d 1168, 1170-71 (8th Cir. 1998); *Davis v. Glanton*, 107 F.3d 1044, 1047 n.4 (3d Cir. 1997); *Sable v. General Motors Corp.*, 90 F.3d 171, 175 (6th Cir. 1996) (finding jurisdiction proper under the Act where necessary to protect federal judgments from state proceedings that would "seriously interfere with" federal consent agreements); *In the Matter of VMS Sec. Litig.*, 103 F.3d 1317, 1323 (7th Cir. 1996); *In re Agent Orange Prod. Liab. Litig.*, 996 F.2d 1425, 1431 (2d Cir. 1993) (explicitly authorizing "[a] district court, in exceptional circumstances, [to] use its All Writs authority to remove an otherwise unremovable state court case in order to effectuate and prevent the frustration of orders it has previously issued.").

Agent Orange is perhaps the most familiar of this genre. There, a group of plaintiffs attempted to revive tort litigation in state court that involved virtually identical claims addressed in a federal court-approved settlement--a settlement that expressly barred those prior class members from instituting such an action against defendants. The defendants removed the actions to federal court and the court dismissed those claims barred by the prior settlement. The Second Circuit upheld the district court's exercise of jurisdiction under the All Writs Act, noting that "exceptional circumstances" existed that authorized the removal of the otherwise unremovable state action. *Id.* at 1431.

VMS Securities is also a noteworthy case permitting removal under the All Writs Act. There, a federal court approved a settlement in a securities fraud class action suit that provided for the release of all further related claims by the class plaintiffs. Thereafter, a group of class plaintiffs filed suit in state court asserting fraud and breach of fiduciary duty claims against the same defendants, claiming that they were wrongfully induced to

join the prior class settlement. The Seventh Circuit, citing *Agent Orange*, held that the district court could assert removal jurisdiction over the state law actions under the All Writs Act for the purpose of dismissing those claims because the court explicitly had retained jurisdiction over the initial class action settlement. 103 F.3d at 1323.

Yet, the principle reflected in both *Agent Orange* and *VMS Securities* – that an otherwise non-removable action is removable under the All Writs Act – must be questioned in the light of the Supreme Court's decision in *Rivet v. Regions Bank of Louisiana* (*Rivet I*), 522 U.S. 470 (1998). In *Rivet I*, a Bankruptcy Court approved the sale of a leasehold estate to a Bank and, after acquiring the entire property, the Bank sold the land to Fountainbleau Storage Associates (FSA). The holders of a second mortgage on the land sued in state court, alleging that the property had been transferred in the bankruptcy proceeding without satisfying their rights as mortgage holders. FSA removed the state action to federal court, arguing that the Bankruptcy Court's orders had resolved the petitioners' rights and that the All Writs Act provided federal-question jurisdiction for the case to be removed for federal court resolution.

The Supreme Court thought the argument a poor one; it held that claim preclusion based on a prior federal judgment is a defensive plea that provides no basis for removal. *Id.* at 476. In so holding, the Court embraced a strict reading of 28 U.S.C. § 1441 (the removal statute) and reemphasized the limited circumstances under which an action in state court can properly be removed to federal court.[10] With *Rivet* standing as sentry, it

---

[10] *Rivet* also calls into doubt the holding of *Baccus v. Parrish*, 45 F.3d 958 (5th Cir. 1995). In *Baccus*, a federal settlement agreement ended a suit involving Texas schools for the mentally retarded. Baccus, the parent of a mentally retarded child, later filed suit in state court challenging the implementation of the settlement agreement. The action was removed to federal court. Removal, however, was not based on the All Writs Act, but

would be bold indeed to read the All Writs Act as authorizing removal of an otherwise unremovable action.[11]

Even accepting the remote proposition that removal still can be proper under the All Writs Act in the face of "extraordinary circumstances,"[12] and further accepting that the procedural

---

instead on the general removal statute, 28 U.S.C. § 1441. We concluded that removal was proper where a claim brought in state court "seeks to attack or undermine an order of a federal district court." *Id.* at 960. The court reasoned that, although the cause of action was brought under the laws of Texas, "courts will typically look beyond the face of a complaint to determine whether removal is proper." *Id.* at 960. Given *Rivet*'s clear instruction that it is improper to look beyond the face of a well-pleaded complaint to determine the propriety of removal, 522 U.S. at 475, and given that the Baccus defendant chose – either wittingly or unwittingly – not to rely on the All Writs Act as support for removal, our decision in *Baccus* retains little precedential value and is, in any event, not applicable to the issues we address in this appeal.

[11] Significantly, on remand in *Rivet* this court illustrated how a federal court's injunctive powers – as contrasted with removal – under the All Writs Act can be used to prevent the frustration of its orders in later state court proceedings. Following the Supreme Court's decision in *Rivet I*, FSA filed suit in federal court under the All Writs Act, seeking injunctions against further proceedings in state court by the petitioners. The petitioners, meanwhile, proceeded with their case in state court. The district court enjoined any litigation in state court regarding the second mortgage that had been decided by the Bankruptcy Court. The petitioners challenged the district court's jurisdiction to issue the injunction, and this court held that, while the All Writs Act is not jurisdictional, the injunction was authorized because "jurisdiction is based on the original case" and "it is not necessary for the district court to have jurisdiction over the second suit as an original action." *Regions Bank of Louisiana v. Rivet (Rivet II)*, 224 F.3d 483, 493 (5th Cir. 2000).

[12] The breadth and specificity of the removal statutes, found at 28 U.S.C. § 1441, et seq., suggests that federal courts should not read other statutes as providing additional, ad hoc avenues for removal. The Supreme Court's characterization of the All Writs Act as "filling the interstices of federal judicial power" in *Pennsylvania Bureau of Correction v. United States Marshals Service*, 474 U.S. 34, 41 (1985), gives credence to the argument that the Act should never be used to supplement the removal statutes:

> The All Writs Act is a residual source of authority to issue

requirements for removal under § 1441 pose no barrier to the use of the All Writs Act to bring a state court matter into federal court,[13] the Rule 202 proceeding in this case clearly does not present such facts or circumstances. The proceeding is only an investigatory tool. Both the State and Private Counsel can only speculate as to the eventual outcome of the probe. This pending state court action over which the district court exercised § 1651 jurisdiction ultimately may or may not pose an actual threat to the federal tobacco settlement. The investigation could lead to no further action, or it could result in a cause of action not contemplated or covered by the settlement agreement; or, indeed, it may lead to the institution of a cause of action for which the invocation of, at least, the injunctive powers of the All Writs Act would be timely and appropriate. In any event, the federal courts cannot preclude the State of Texas from investigating potential claims in the milieu of the Texas courts – pursuant to Texas law – unless and until such investigation poses an actual threat to the settlement agreement. Private Counsel's claim that such a threat exists is premature.

> writs that are not otherwise covered by statute. Where a statute specifically addresses the particular issue at hand, it is that authority, and not the All Writs Act, that is controlling.

Id. at 43 (emphasis added). *See also* Joan Steinman, *The Newest Frontier of Judicial Activism: Removal Under the All Writs Act*, 80 B.U. L. REV. 773 (2000).

[13] The explicit and detailed procedural guidelines for removal outlined by Congress support a finding that removal under the All Writs Act, particularly in this case, is inappropriate. 28 U.S.C. § 1446(a) requires that any claim filed in state court and thereafter removed "shall" be removed to the federal district court "for the district and division within which such action is pending." Texas filed its Rule 202 proceeding in Harris County state court, located in the Southern District of Texas. In order to bring the proceeding before the court that had issued the final judgment in this case, however, Private Counsel "removed" the proceeding directly to the Eastern District of Texas, Texarkana Division.

We recognize that if, at some point in the future, the State attempts explicitly to upset provisions of the settlement agreement in state court, circumstances may well dictate that the proceeding be enjoined. Indeed, we will not decide today whether, under "extraordinary circumstances," the case may be "removed" to federal court under the All Writs Act. In the absence of such extraordinary circumstances, however, that indisputably demand such a course of action as absolutely necessary to vouchsafe the central integrity of the federal court judgment, we hold that the All Writs Act cannot be employed as a vehicle for removal.[14]

IV

In sum, we hold that the district court erred in exercising its jurisdiction under the All Writs Act and in denying the State's motion to remand. We therefore reverse and remand to the district court with instructions to remand the Rule 202 proceeding to the Texas state court from which it was removed.

REVERSED AND REMANDED.

---

[14] Because we find no basis for federal jurisdiction in this case, we need not address the other issues raised in this appeal – the scope of Texas's Eleventh Amendment immunity and whether the Rule 202 proceeding was a "civil action" for removal purposes.

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS,
TEXARKANA DIVISION

CORNYN v. REAL PARTIES IN INTEREST

5:00-CV-118

MEMORANDUM OPINION AND ORDER

Before the Court is the State of Texas's (the "State") "Emergency Motion to Remand," (Dkt. No. 16). The State argues that this Court lacks jurisdiction over a state-court proceeding initiated to investigate the conduct of several private attorneys. After consideration, the Court concludes that it does have jurisdiction over the instant proceeding. The State's motion to remand is therefore denied.

BACKGROUND

I

The genesis of this matter is a May 22, 1996 agreement between then-Texas attorney general Dan Morales and several private attorneys (hereinafter "Private Counsel"), which called for the attorneys to represent the State in its suit against the tobacco industry. Specifically, the agreement – titled the Outside Counsel Agreement or "OCA" – required Private Counsel to advance all costs and expenses (up to $10 million) associated with prosecuting the suit. (*See* No. 5:96-CV-91, Dkt. No. 1853, Ex. A (OCA), at 1.) The OCA provided that Private Counsel were entitled to a 15% share of the State's total recovery plus reimbursement for expenses. (OCA, Ex. B, at 5, ¶¶ 1 & 3.) The OCA further provided that Private Counsel were prohibited from undertaking any work "which would create a conflict of interest

for Counsel or the Attorney General . . .[and that] Counsel [] agree to inform their clients of any case involving a potential conflict." (OCA at 1, ¶ 4.)

On March 26, 1996, Private Counsel, on behalf of the State, filed suit in this Court against the tobacco industry. *See Texas v. American Tobacco Co.*, No. 5:96-CV-91 (E.D. Tex.)(the "tobacco litigation"). During the 22 months that followed, the tobacco litigation generated nineteen hundred docket entries, including thousands of pages of briefing. Approximately 23 million documents were produced, hundreds of depositions were taken, 50,000 exhibits were listed, and 1,500 witnesses were designated. Four hundred seventy-two motions were filed and 21 hearings were conducted. Four hundred fifty hours – or about six months – were allotted for trial of the case.

In late 1997, the week before jury selection was scheduled to begin, and with a nationwide tobacco settlement in the works that threatened to limit the State's recovery, the State and the industry achieved a settlement. The settlement called for the State to dismiss its claims against the tobacco industry in exchange for $ 15.3 billion. The terms of the settlement were memorialized in the Comprehensive Settlement and Release ("CSA"). Finalization of the CSA was made contingent upon Court approval. On January 22, 2000, the Court entered final judgment in the tobacco litigation and adopted and incorporated the CSA as an enforceable order. (*See* Final Judgment, 5:96-CV-91, Dkt. No. 1866, Jan. 22, 1998, at 1-2.) The approval order states:

> It is [] ordered that this Court shall have exclusive jurisdiction over the provisions of the Comprehensive Settlement Agreement and Release, this Order[,] and the Final Judgment. All persons in privity with the parties, including all persons represented by the parties, who seek to raise any objections or challenges in any forum to any provision of this Judgment are hereby enjoined from

proceeding in any other state or federal court.

(*Id.*, Ex. B (Agreed Order Granting Joint Motion to Approve Settlement Agreement).) Similarly, the first paragraph of the CSA states:

> Settling Defendants and the State of Texas acknowledge that this Court has jurisdiction over the subject matter of this action and over each of the parties hereto, and this Court shall retain jurisdiction for the purposes of implementing and enforcing this Settlement Agreement. The parties hereto agree to present any disputes under this Settlement Agreement, including without limitation any claims for breach or enforcement of this Settlement Agreement, exclusively to this Court.

(*Id.*, Ex. A (CSA), at 4, ¶ 1.) Paragraph 3 of the CSA states that "the State of Texas and the Settling Defendants acknowledge and agree that this Settlement Agreement is voluntarily entered into by all parties hereto as the result of arm[']s[-]length negotiations during which all such parties were represented by counsel." (CSA at 5, ¶ 3.) The CSA further states that "the settlement negotiations resulting in this Settlement Agreement have been undertaken by the parties hereto in good faith and for settlement purposes only. . . ." (CSA at 23, ¶ 22.)

Paragraph 17 of the CSA states:

> (a) Reimbursement of Costs and Expenses. Settling Defendants will reimburse . . . Private Counsel for reasonable costs and expenses incurred in connection with this litigation, provided that such costs and expenses are of the same nature as costs and expenses for which Settling Defendants would reimburse their own counsel or agents . . . . In addition, within 30 days after the date of this Settlement Agreement, Settling Defendants shall . . . pay to [Private Counsel] an amount equivalent to Private Counsel's best estimate of their reasonable costs and

> expenses. . . . Private Counsel shall provide Settling Defendants with an approximately documented statement of their costs and expenses. . . .

(CSA at 19-20, ¶ 17(a).) Regarding protective orders associated with the tobacco litigation, the CSA provides that

> any restrictions imposed by any protective order in this action governing treatment of discovery materials during the pendency of this action shall remain in effect, and existing confidentiality designations shall remain undisturbed until . . . [not later than] December 31, 1999. Thereafter, any party to the action may make any motion with respect to discovery materials. . . .

(CSA at 23-24, ¶ 22; *see also* Final Confidentiality Order, Dkt. No. 632, July 3, 1997.)

On January 16, 1998, Private Counsel submitted a motion for approval of their attorneys' fees. On January 22, 1998, the Court entered a memorandum opinion and order which concluded that the amount of attorneys' fees Private Counsel was due under the OCA – about $ 2.3 billion – was reasonable. (*See* Final Judgment Ex. C.[1]) In its January 22 memorandum, the Court acknowledged Private Counsel's claim that they incurred approximately $ 10 million in out-of-pocket expenses prosecuting the tobacco litigation. (*Id.* at 10.)

Shortly thereafter, on January 30, 1998, a mandamus action in the Texas Supreme Court filed by a group of Texas legislators was removed to this Court. *See In re Fraser*, 75 F. Supp. 2d 572 (E.D. Tex.). The legislators had asked the Texas court to require Attorney General Morales to declare that the attorney general of Texas had no statutory or constitutional authority to bind the State to a contingent fee arrangement for legal services. The

---

[1] Pursuant to party agreement, the Court's memorandum opinion and order was vacated May 16, 2000.

legislators argued that removal of the mandamus action to federal court would violate the Eleventh Amendment since the suit sought to compel a state officer to act according to state law. The legislators also argued that the OCA's contingent fee provision was unenforceable because the State, via the Eleventh Amendment, was immunized against being sued in federal court. The same legislators, on February 5, 1998, along with Governor George W. Bush, separately, moved to intervene in the tobacco litigation. The interveners, raising much the same issues as those raised in *In re Fraser*, asked for a separate resolution of the attorneys' fees questions and that the Court stay the disbursement of the settlement funds until the fee issue was resolved. Shortly thereafter, the Court stayed enforcement of the CSA.

On June 22, 1998, an agreement was achieved between the antagonists to the attorneys'-fees issue (the "Agreement"). Under the Agreement, Private Counsel were presented with a choice: they could either attempt to enforce the contingent fee provision in the OCA, or they could elect to take an amount awarded by an arbitration panel. (*See* Order, No. 5:98-CV-270, Dkt. No. 1, Ex. A, at 3-4, ¶ E.) If they chose the latter, the tobacco industry would pay the panel award and Private Counsel would waive any claim they might have had against the State under the OCA. (*Id.*) The Agreement also provided that all pending motions pertaining to the fee dispute would be stayed until Private Counsel made their election. (*Id.* at 2-3, ¶ B.) The Agreement further provided that the fee dispute would be "severed" from the tobacco litigation. (*Id.* at 2, ¶ A.) On July 24, 1998, the Court adopted the Agreement and separated the fee issues from the tobacco litigation. *See In re Private Counsel Fee Agreement*, 98 F. Supp. 2d 788 (E.D. Tex.) ("*In re Private Counsel*").

On December 15, 1998, the panel awarded Private Counsel $ 3.3 billion in fees. Under the Agreement, Private Counsel had until December 30 to make their election. On December 30,

Private Counsel filed a motion to extend the election deadline.[3] The State opposed the motion and argued that the Court could not consider an extension until the Court first ruled on the State's challenges to the Court's jurisdiction. On November 5, 1999, the Court concluded that the State's jurisdictional arguments were without merit. *See In re Fraser*, 75 F. Supp. 2d 572 (E.D. Tex. 1999); *In re Private Counsel*, 1999 WL 1022131 (E.D. Tex.). Also on November 5, the Court gave Private Counsel until November 19 to make its election under the Agreement. *See In re Private Counsel*, 1999 WL 1022128 (E.D. Tex.). On November 19, 1999, Private Counsel elected to take the panel award and to waive their right to sue under the OCA. On December 6, 1999, the State appealed the Court's November 5 ruling to the U.S. Court of Appeals for the Fifth Circuit. The Fifth Circuit recently dismissed the State's appeals and vacated this Court's November 5 orders.

II

On April 27, 2000, the State filed a document entitled "Petition Requesting an Order Authorizing Oral Depositions to Investigate Potential Claims or Suit" in the District Court of Harris County, Texas. (*See* Pet. at 1.) The petition moves the state district court, pursuant to Tex. R. Civ. P. 202, to allow the State to "investigate potential claims it believes it may possess for conversion and breach of fiduciary duty" against Private Counsel. (*Id.*) Specifically, the State seeks to depose Private Counsel as to

> whether the parties to the OCA engaged in the improper exchange of consideration so that Private Counsel could obtain the contract;

---

[3] In the interim, Texas voters elected a new attorney general. On January 13, 1999, the new attorney general was sworn-in; soon thereafter, he joined in support of the Governor's and the legislators' arguments in all significant respects.

whether Private Counsel knew or should have known that the OCA was unenforceable;

whether Private Counsel used the relationship[3] to benefit their own personal interests to the detriment of the State, and how Private Counsel improperly used the relationship to benefit their own personal interest to the detriment of the State;

which tobacco litigation documents are being withheld from the State; the subject matter of those documents; the circumstances underlying the reason withholding the documents; the circumstances under which the documents were created; and where the withheld documents are being kept;

whether documentation exists which supports the expenditure of $ 40 million in expenses; and

other relevant areas of inquiry.

(Pet. at 4.) On April 28, 2000, Private Counsel removed the state-court proceeding to this Court. Private Counsel contend that this Court has jurisdiction over the State's petition because (1) the petition raises a question of federal law and is therefore removable pursuant to 28 U.S.C. § 1441; (2) the matters raised in the petition are ancillary and supplemental the tobacco litigation and the Court's orders entered therein; and (3) the petition implicates the orders of this Court and is therefore subject to removal under the All Writs Act, 28 U.S.C. § 1651. On May 12, 2000, the State filed the instant motion to remand.

DISCUSSION

In its motion to remand, the State argues that this Court lacks jurisdiction over the instant proceeding because (1) the

---

[3] Presumably, "the relationship" refers to the attorney-client relationship that arose from Private Counsel's contract with the State.

proceeding is not a "civil action"; (2) no question of federal law is raised on the face of the State's well-pleaded petition; (3) this matter should have been removed to the district and division embracing the state court where the State filed its petition; (4) removal is not proper under the All Writs Act; and (5) the Eleventh Amendment is a bar to removal. The Court will address each argument in turn.

I

The removal statute, 28 U.S.C. § 1441, provides, in relevant part:

> (a) Except as otherwise expressly provided by Act of Congress, any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to the district court of the United States for the district and division embracing the place where such action is pending. * * *

The State argues that its petition does not initiate a "civil action" under § 1441 because a Rule 202 proceeding lacks the characteristics of a "full-blown lawsuit."

A

1. The first place the Court must turn to address the State's argument is the removal statute itself. *See* 16 JAMES WM. MOORE, ET AL., MOORE'S FEDERAL PRACTICE AND PROCEDURE § 107 App. 101[2] ("Whether a state proceeding is a civil action, for removal purposes, and has been properly removed involves the construction of the removal statute. . . ."). The text of § 1441 does not define the term "civil action." The Court notes, however, that the term is not used exclusively in the removal statute and associated sections. For example, §§ 1442-1443 & 1446 speak of "civil actions" and "criminal prosecutions," which suggests that the term "civil action" is meant not to define a civil proceeding with certain level of involvement, but instead to

distinguish civil proceedings from criminal ones. Section 1446(b), on the other hand, which provides the deadlines for removal in civil matters, speaks of both "actions" and "proceedings," which might suggest that some non-criminal proceedings are something less than "actions."

2. As the statute is less-than-definitive on the question of what is a civil action, the Court turns to legislative history and case law.[4] The words "civil action" were not used to the exclusion of other terms until 1948, when the modern-day version of the removal statute was enacted. The first removal provision, which was contained in the Judiciary Act of 1789, permitted removal of "suits" against aliens or where there was diversity of citizenship. In *Weston v. City Council of Charleston*, 27 U.S. 449, 464 (1829), the Supreme Court concluded that the term "suit" "is certainly a very comprehensive one, and is understood to apply to any proceeding in a court of justice, by which an individual pursues that remedy in a court of justice, which the law affords him." In *Weston*, the plaintiffs, in state court, filed a "suggestion for a prohibition," an equity proceeding through which plaintiffs prayed that the city council be barred from assessing an allegedly unconstitutional tax. *Id.* at 449. The prohibition was granted, and appeal was taken to South Carolina's high court. The South Carolina court upheld the constitutionality of the tax, and plaintiffs, in turn, appealed to the Supreme Court. The question for the Court, then, was whether under the provision of the 1789 act in question, a writ of prohibition was a "suit." *Id.* at 463. Chief Justice Marshall, writing for the Court, construed the term "suit" broadly. That plaintiffs did not couch their pleading as stating a cause of action at law, and instead initiated an equity proceeding, made no difference to the Chief Justice: "The modes of proceeding may be various, but if a right is litigated between parties in a court of

---

[4] The Court's discussion of the history of the removal statute tracks volume 16 of MOORE'S FEDERAL PRACTICE, section 106.

justice, the proceeding by which the decision of the court is sought, is a suit" *Id.*

In 1875, the statute was re-enacted to provide for the removal of "any suit of a civil nature, at law or in equity." *See* 16 MOORE'S § 107 App. 101[2] n.7. In *Upshur County v. Rich*, 135 U.S. 467 (1890), the Court was again faced with the meaning of the term "suit." In that case, the Court concluded that an appeal of a tax assessment to a state's "county court" was not a "suit" because the proceeding lacked the indicia of a judicial tribunal. *Id.* at 470. The Court reasoned that a necessary element of a removable proceeding is that it be before a bona fide court; that is, there must a dispute between litigants before a tribunal that has the power to determine questions of law and fact. *Id.* at 477. The "county court" in *Upshur County*, conversely, was an administrative tribunal and had "no[] judicial powers, except in matters of probate." *Id.* at 471.

In 1911, the removal statute was again revisited; like the 1875 act, the 1911 statute contained the language "any suit of a civil nature, at law or in equity." *See* 16 MOORE'S § 107 App. 101[2] n.10. In *Commissioners of Lafayette County v. St. Louis Southwestern Railway Co.*, 257 U.S. 547 (1922), the Supreme Court considered whether a county-court hearing constituted a removable "suit." In *Lafayette County*, the county commissioners assessed a tax on land belonging to Southwestern Railway. *Id.* at 550. The commissioners notified landowners that a hearing on the assessment would be held in county court. The day before the hearing, the railroad removed the proceeding to federal district court; the commissioners' motion to remand that followed was denied. Writing for the Court, Chief Justice Taft described the characteristics of the county-court proceeding: it involved a dispute between parties, the commissioners on one side, the landowners on the other; there were pleadings – namely, the record of the commissioners' assessment plus the landowners' objections thereto; the court was to conduct an inquiry into reasonableness of the assessment; the court's determination was

an enforceable order; and the determination is subject to review on appeal. *Id.* at 557 & 559. The proceeding, the Court concluded, had "all the elements of a judicial controversy." *Id.* at 557.

The Lafayette County commissioners, however, argued that the state supreme court had already determined that the proceedings like the one at issue did not constitute a removable suit. *Id.* at 557. The Court dismissed the commissioners' argument:

> The question of removal under the federal statute is one for the consideration of the federal court. It is not concluded by the view of a state court as to what is a suit within the statute. While the decision of the state court as to the nature of a proceeding under state statutes sought to be removed is, of course, very persuasive, it is not controlling. . . .

Id. at 557-58. The commissioners also argued that the proceeding – a prove-up on a tax assessment – could not be removed since it could not have been originally filed in federal district court. *Id.* at 561. Chief Justice Taft responded that the removal statute's requirement of original jurisdiction

> is not intended to exclude from the right of removal defendants in cases in the state court which, because of their peculiar form would be awkward as an original suit in a federal court, or would require therein a reframing of the complaint and different procedure. The limitation is that only those proceedings can be removed which have the same essentials as original suits permissible in District Courts; that is that they can be readily assimilated to suits at common law or equity. . . .

Id. at 561-62.

Along the same lines, in *English v. Improved Order of Heptasophs*, 235 F. 630 (D.N.J. 1916), a district court considered

the qualities that make a suit ripe for removal. In *English*, English sought a permanent injunction against the Heptasophs. *Id.* The court ordered the Heptasophs to show cause why it should not issue an injunction; the Heptasophs, in turn, removed the matter to federal district court. *Id.* In its motion to remand, English argued that under New Jersey law, a suit is not brought for removal purposes until a subpoena issues. The district court disagreed, stating that it is not for New Jersey law to determine whether removal under the federal statute is appropriate. Rather, the court turned to the posture of the state-court proceeding and noted that the Heptasophs were required to answer the show-cause order. *Id.* at 631. The district court concluded that "whatever the form of proceeding to bring a defendant into court, a suit is brought when such defendant is subjected to judicial orders." *Id.*

To summarize, the Supreme Court has broadly construed the various terms used to describe removable proceedings. Specifically, the Court has said that a removable proceeding is one in which there are one or more of the following: a dispute between parties; a prayer for relief (either at law or in equity); pleadings; a tribunal with the power to determine questions of law and fact; the determination of the tribunal is subject to review; and enforceable orders. A removable proceeding is considered brought once a party is subject to court orders.

3. In 1948, what was to become the modern-day removal statute was enacted. *See* ch. 646, 62 Stat. 937 (June 25, 1948)(codified at 28 U.S.C. §§ 1441-1450). The 1948 act was "based on" and intended to "consolidate" its predecessors. *Id.* (reviser's notes). The 1948 act substituted "phrases such as 'in suits of a civil nature, at law or in equity,' the words 'case,' 'cause,' 'suit,' and the like . . . [from predecessor statutes for] the words 'civil action.'" *Id.* The change in terminology was meant to harmonize the removal statute with the Federal Rules of Civil Procedure, which became effective in 1938 and did away with the distinction between proceedings in law and those in equity.

Id.; *see* Fed. R. Civ. P. 2. (declaring that there is one form of action). The change is believed not to have intended an affect on the breadth of the removal statute. *See* 16 MOORE'S ¶ 107App.101[2] (referencing revisor's notes). Instead, the new term was aimed at distinguishing non-removable criminal actions from civil ones. *See id.*; *cf. Milwaukee County v. White Co.*, 296 U.S. 268, 270 (stating that the term "suits of a civil nature" from a predecessor removal statute "is used in contradistinction to 'crimes and offenses'. . . ."). "In effect, therefore, the limitation to civil actions in Section 1441 may mean no more than that state court criminal, and perhaps penalty, actions are not removable. . . ." Charles Alan Wright, et al., 14B FEDERAL PRACTICE AND PROCEDURE § 3721 (3d ed. 1998).

B

Having gone through the history and meaning of the term "civil action" in excruciating detail, the Court turns to the proceeding in question. Generally, Rule 202 provides

> A person may petition the court for an order authorizing the taking of a deposition on oral examination or written questions either: (a) to perpetuate or obtain the person's own testimony or that of any other person for use in an anticipated suit; or (b) to investigate a potential claim or suit.

Tex. R. Civ. P. 202.1. Parts two through five, 202.2-.5, provide the procedural requirements of the rule. A Rule 202 petitioner must, where suit is anticipated, determine the county where venue in the anticipated action would lie and file its petition with the county court there. *Id.* 202.2(b). The petitioner must state the subject matter of the anticipated action, *id.* 202(e), and give the names, addresses, and phone numbers of persons against whom petitioner expects to have adverse interests, *id.* 202.2(f)(1). The petitioner must state the substance of the testimony it expects to elicit, *id.* 202.2(g), and request a court order authoring the depositions requested, *id.* 202(h). Lastly, before the state court

may authorize the taking of depositions, the court must find that

> (1) allowing the petitioner to take the requested deposition may prevent a failure or delay of justice in an anticipated suit; or
>
> (2) the likely benefit of allowing the petitioner to take the requested deposition to investigate a potential claim outweighs the burden or expense of the procedure.

Id. 202.4(a).

Viewing Tex. R. Civ. P. 202 and its requirements in the context of the foregoing discussion of § 1441, the Court concludes that a Rule 202 proceeding is a "civil action." Rule 202 possesses all the elements of a judicial proceeding: there is a controversy between parties; there are pleadings (the State's petition); relief is sought (the State has prayed for a court order authorizing the taking of depositions); and a judicial determination is required – specifically, whether authorizing depositions may prevent injustice or, on balance, will not be unduly burdensome.[5] Finally, both parties will be required to

---

[5] In its petition, the State suggests that it has invoked Rule 202 to "investigate a potential claim or suit," (Pet. at 1.), as opposed to obtain testimony in advance of an "anticipated" suit. For example, the State's petition argues that the benefit of depositions outweighs the burden and expense they would impose, (*id.* at 6), an argument which pertains to a determination used exclusively in cases where 202 is invoked to investigate a claim, *see* Tex. R. Civ. P. 202.4(a)(2). At other points in its petition, however, the State speaks as though it wants discovery for an anticipated suit. For instance, the State designates adverse parties, (*id.* at 2-4), and states that venue is proper in Harris County, (*id.* at 6). These two disclosures are consistent with employing Rule 202 to prepare for an anticipated suit. The distinction is potentially important because the procedural requirements where suit is anticipated, compared with those to investigate a claim, are more stringent. And, as discussed above, the presence of the elements of a judicial controversy is an important factor in determining whether there is a civil action. Ultimately, however, the Court concludes the distinction is not determinative; under either the investigation or anticipated-suit prongs, the state court is required to make

adhere to the state court's orders.

C

1. Although the Fifth Circuit has not addressed the removability of Rule 202 proceeding, the Northern District of Texas has. *See Mayfield-George v. Texas Rehab. Comm'n*, 2000 U.S. Dist. LEXIS 6610, No. 3:99-CV-3735X, 2000 WL 626853 (N.D. Tex. May 15, 2000). In *Mayfield-George*, Mayfield-George filed a Rule 202 petition in state court to investigate a possible claim against the Texas Rehabilitation Commission ("THC"). *Id.* at *1. The day before the state district court was to conduct a hearing on Mayfield-George's petition, THC, pursuant to § 1441(b), removed the proceeding to federal district court. In its motion to remand, Mayfield-George argued that a petition brought pursuant to Rule 202 is not a "civil action"; specifically, he argued that the petition does not assert a claim against THC, but instead merely seeks to take depositions of THC employees to determine whether a claim against THC would lie. *Id.* at *2-*3. In response, the attorney general's office, on behalf of THC, argued that the term "civil action" should be construed broadly. *See* THC's Resp. Mot. Remand at 2. The attorney general also emphasized that the Rule 202 proceeding was an independent action and that it cannot be ancillary to another state-court proceeding because no other state-court action was pending. *Id.* at 6. The Honorable Joe Kendall, however, agreed with Mayfield-George, concluding that a Rule 202 proceeding cannot be a "civil action" as "it asserts no claim or cause of action upon which relief can be granted." *Id.*; *see also In re Hinote*, 179 F.R.D. 335, 336 (S.D. Ala. 1998) (holding that in the absence of a complaint there can be no "civil action"); *Sunbeam Television Corp v. Columbia Broadcasting Sys., Inc.*, 694 F. Supp. 889, 891 (S.D. Fla. 1988) (same).

After considering *Mayfield-George* in light of the foregoing

---

a judicial finding, which is sin qui non of a judicial proceeding.

construction of the removal statute, the Court respectfully disagrees with the Judge Kendall's holding. In *Mayfield-George*, the court found that the assertion of a cause of action is an essential element of a removable action. This Court does not disagree; however, as discussed above, an asserted claim can take many forms. *See Weston, supra* at 449. The fact that a cause of action at-law has not been made, which was also the objection in *Hinote* and *Sunbeam Television*, cannot turn a proceeding that clearly has all the indicia of a judicial proceeding into something less. Rather than looking at one criteria in isolation, the Court must look at the proceeding as a whole. Here, among other things, there are pleadings, judicial determinations, and relief is sought, *see HMB Acquisition Corp. v. Cohen*, 143 F.R.D. 50, 51 (concluding that discovery provides substantive relief where a proceeding is instituted to obtain it), *vacated in part on other grounds*, 145 F.R.D. 30 (S.D.N.Y. 1992). In short, the instant proceeding has all the qualities of a "civil action."

2. The State also puts forth *Wilson v. Belin*, 20 F.3d 644 (5th Cir. 1994) in support of its argument. In *Wilson*, Wilson, on September 3, initiated a Texas state-court discovery proceeding to determine whether he had a claim against Blakey. *Id.* at 646. On November 13, Wilson filed his complaint. On December 22, Blakey removed the state-court proceeding. The federal district court then granted Blakey's and his co-defendant's motion to dismiss on the grounds that the court lacked specific and personal jurisdiction. *Id.* On appeal, Blakey argued, inter alia, that removal was untimely. *Id.* at 651 n. 8. The Fifth Circuit, construing 28 U.S.C. § 1446(b), which provides the requirements for timely removal, concluded that as between the petition to initiate discovery and the complaint, it was the latter that started the 30-day deadline for removal since the complaint was "the first document stating a claim." *Id.*; *cf. Christian, Klein & Cogburn v. NASD, Inc.*, 970 F. Supp. 276, 278-79 (S.D.N.Y. 1997) (Sotomayor, J.) (concluding that a petition for state-court pre-complaint discovery, standing alone, is an "initial pleading"

under § 1446(b)).

Contrary to the State's argument, however, *Wilson*'s footnote does not stand for the proposition that a state-court discovery proceeding is not removable. *Wilson* addressed § 1446(b), which as noted provides deadlines for removal. Section 1446, however, does not define what kind of proceeding is removable; that is within the ambient of § 1441. Section 1441's removal criteria – e.g., that the proceeding be a "civil action," and that the state tribunal be a "court" – do "not concern the broader although related question as to when defendant's time for removal will expire. . . ." *See* 16 MOORE'S ¶ 107App.101[6]. Thus, a state-court proceeding can be a removable "civil action" under § 1441 even though the petition initiating the proceeding is not an "initial pleading" under § 1446(b). *See id.* That the Wilson court concluded that it was Belin's complaint, rather than his petition for discovery, that initiated the removal deadline does affect this Court's holding that the State's Rule 202 petition is a removable "civil action."

3. Finally, even though a state-court determination of state rule is not controlling for purposes of removal, the Court pauses to note that at least one Texas court has considered the nature of a Rule 202 proceeding. *See Valley Baptist Medical Ctr. v. Gonzalez*, 18 S.W.3d 673, 678 (Tex. App. – Corpus Christi, 1999, pet. filed Mar. 21, 2000). In *Valley Baptist*, which was relied upon by Judge Kendall in *Mayfield-George*, the court of appeals, considering its own jurisdiction, held that an order permitting the taking of depositions under Rule 202 is not reviewable on direct appeal because the "proceeding is not, in itself, a separate lawsuit, but is incident to and in anticipation of a suit." *See id.* at 676; *see also* Michol O'Connor, et al., O'CONNOR'S TEXAS RULES, CIVIL TRIALS 1999 (1998) 351-53. The question of whether a proceeding is separate or ancillary to a state-court proceeding is important for purposes of removal: if the proceeding is separate, it is removable; if it is ancillary, it is not. *See* Wright, et al. § 3721. The court's holding in *Valley*

Baptist that a Rule 202 proceeding is ancillary, has, admittedly, been difficult for this Court to conceptualize: to say that a proceeding is ancillary to an investigation or an anticipated suit is to say that it is ancillary to nothing. Moreover, the court's holding runs counter to the conclusions of Justice Hecht, who is regarded as a leading expert on Texas's rules of procedure. *See* Nathan L. Hecht & Robert H. Pemberton, A GUIDE TO THE 1999 TEXAS DISCOVERY RULES REVISIONS (Nov.11, 1998) (stating that under Rule 202's predecessor, Rule 737, which Rule 202 "replaces and limits," "a person could bring an independent action to obtain an order authorizing a deposition of any other person to investigate a potential claim or anticipated lawsuit") (emphasis added).[6] Anyhow, *Valley Baptist*'s precept that an order authorizing depositions pursuant to Rule 202 is interlocutory, is, at best, not dispositive; at worst it is inconsistent with this Court's analysis that a Rule 202 proceeding has all the indicia of a civil action under the removal statute.

II

Having determined that a Rule 202 proceeding is a civil action, the Court turns to the question of whether the instant proceeding falls within the original jurisdiction of this Court. As an initial matter, the Court notes that the Fifth Circuit has held that "a claim brought in state court [that] seeks to attack or undermine an order of a federal district court" falls within the original jurisdiction of the district courts. *See Baccus v. Parrish*, 45 F.3d 958, 960 (5th Cir. 1995) (citing § 1441(a) and *Villarreal v. Brown Express, Inc.*, 529 F.2d 1219, 1221 (5th Cir. 1976)); *see also Nowling v. Aero Services Int'l, Inc.*, 734 F. Supp. 733 (E.D. La. 1990) ("[A] state[-]law claim is said to have federal character when . . . it calls into question a federal court order."). In *Baccus*, the parties achieved a settlement agreement in a suit

---

[6] This article can be found at <www.supreme.courts.state.tx.us/rules/tdr/disccle3.htm> (visited Aug. 8, 2000).

concerning Texas's state schools for the mentally retarded. *Id.* 45 F.3d at 959. The agreement called for the state to close down two schools; the state later passed legislation that would form a panel to make recommendations regarding school closure. Final passage of the legislation was contingent upon the district court's acceptance of the settlement; court approval occurred sometime thereafter. Later, Baccus, in state court, sought to enjoin the panel, alleging that the composition of the panel and the law creating it were unlawful. The action was removed then transferred to the district court that approved the settlement agreement. Baccus moved for remand, arguing that the district court lacked subject matter jurisdiction because his petition asserted exclusively state-law claims. Importantly, the face of Baccus's petition did not raise a federal question. The district court denied the motion to remand, and Baccus appealed. On appeal, the Fifth Circuit found that were Baccus to succeed in his state-court suit it would have "affected" the settlement agreement. *Id.* at 961. Therefore, the court concluded, Baccus's suit "is properly characterized as a collateral attack on the settlement agreement . . . ." *Id.*; *see also Nowling*, 734 F. Supp. at 737 ("This case is no more than an attempt to collaterally attack [the court's] Orders, and is possessed of the very kind of federal character sufficient to support removal.").

The foregoing notwithstanding, not since *Rivet v. Regions Bank of Louisiana*, 522 U.S. 470 (1998), has a federal court held, as *Baccus* did, *supra* 45 F.3d at 960-61, that it is proper to look beyond the face of a well-pleaded complaint to determine whether removal is proper. *Baccus* and courts like it, *see, e.g.*, *Nowling*, *supra*, followed an exception to the well-pleaded complaint rule – the so-called artful pleading doctrine. The purpose of this doctrine was to prevent plaintiff from avoiding federal court simply by omitting a "necessary federal question" from the complaint. *See Franchise Tax Bd. v. Construction Laborers Vacation Trust*, 463 U.S. 1, 22 (1983). Recently, however, the Supreme Court held that the artful pleading

doctrine applies only in cases where federal law completely preempts plaintiff's state-law cause of action.[7] *See Waste Control Specialists v. Envirocare of Texas, Inc.*, 199 F.3d 781, 783 (5th Cir. 2000) (construing *Rivet, supra*). Here, it not disputed that the face of the State's petition does not raise a federal question. Accordingly, this matter does not "arise under" the laws of the United States for purposes of § 1441(b) and is not within the original jurisdiction of this Court.[8]

III

Private Counsel argue that the supplemental jurisdiction statute allows this Court to exercise jurisdiction over the instant proceeding because the proceeding is related to the tobacco litigation and this Court's orders therein. The supplemental jurisdiction statute provides that in

> any civil action of which the district courts have original jurisdiction, the district courts shall have supplemental jurisdiction over all other claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution.

---

[7] As an aside, the Court notes that *Baccus* is cited in the leading federal practice and procedure treatise for the proposition that when a federal court expressly retains jurisdiction over a lawsuit, the court effectively preempts the field insofar as other litigation relating to that lawsuit is concerned. *See* 14B Wright, et al., § 3722.1 n. 8. Although *Baccus* does not itself speak of complete preemption, an argument can be made that where a district court retains jurisdiction over a settlement agreement, like the court did in *Baccus* and this Court did here, it forecloses litigation in other courts. As far as this Court is aware, however, no court has expressly applied the doctrine in such a case; and without further authority, the Court is not inclined to exercise jurisdiction on that basis.

[8] Having concluded that this matter is not removable under the removal statute, the Court need not address § 1441's requirement that the suit be removed to the district and division embracing the state court.

28 U.S.C. § 1367(a). An often-quoted case describes the supplemental jurisdiction statute as follows:

> Section 1367 allows plaintiffs to bring federal claims in federal court even though combined with state-law claims that would not otherwise be within the federal court's jurisdiction. The statute is not, however, an independent source of removal jurisdiction. To remove the petition from state court to federal court, * * * [defendants] must first find a federal claim in the Petition itself. An already-existing federal claim cannot provide the mechanism for removal of a non-removable state-court action.

14B Wright, et al. § 3722 (quoting *In re Estate of Tabas*, 879 F. Supp. 464, 467 (E.D. Pa. 1995)). As the Court noted above, the instant Rule 202 proceeding does not itself fall within the original jurisdiction of the district courts; the supplemental jurisdiction statute, therefore, cannot recharacterize it.

The supplemental jurisdiction statute, however, is but a subset of ancillary jurisdiction. Ancillary jurisdiction, as the Supreme Court has recognized, is a nonstatutory doctrine that has survived § 1367's enactment. *See Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 379-80 (1994). In *Kokkonen*, decided four years after the enactment of § 1367, Kokkonen filed suit against Guardian for breach of an agency agreement. *Id.* at 376. The parties settled their dispute, and the terms of the settlement were read into the record. Thereafter, the district court dismissed the action with prejudice. Later, the parties disagreed on whether, under the settlement agreement, Kokkonen was required to return certain files. *Id.* at 377. Guardian moved the district court to enforce the agreement; Kokkonen opposed on the grounds that the district court lacked subject-matter jurisdiction. The district court entered an enforcement order, concluding that it had an "inherent power" to do so. Kokkonen appealed and the circuit court affirmed. On appeal, the Supreme

Court stated that the "enforcement of a settlement agreement, . . . whether through award of damages or specific performance, is more than a continuation or renewal of the dismissed suit, and hence requires its own basis for jurisdiction." *Id.* at 378. In *Kokkonen*, there was no such basis. *Id.* at 381-82.

The Court noted, however, that the situation is a very different one where the settlement agreement is made part of the dismissal order – "either by separate provision (such as a provision 'retaining jurisdiction' over the settlement agreement) or by incorporating the terms of the settlement agreement in the order." *Id.* at 381. In that case, "a breach of the agreement would be a violation of the order, and ancillary jurisdiction to enforce the agreement would therefore exist." *Id.* This incarnation of ancillary jurisdiction exists "to enable a court to function successfully, that is, to manage its proceedings, vindicate its authority, and effectuate its decrees. . . ." *Id.* at 380 (citations omitted).

Although (as seen above) ancillary jurisdiction is larger in scope than its progeny, the Court concludes that ancillary jurisdiction cannot confer an independent basis for jurisdiction for the same reason that supplemental jurisdiction cannot. The touchstone of ancillary jurisdiction – and supplemental jurisdiction for that matter – is that the ancillary matter must be joined with a suit that falls within the original jurisdiction of the federal court at the time of removal. Although it runs counter the purpose of ancillary jurisdiction – that is, the efficient adjudication of related claims – courts have consistently found that a plaintiff may maintain parallel proceedings in state and federal court. Thus, plaintiff can assert a claim that falls within the original jurisdiction of the federal courts; later, plaintiff can assert a related state-law claim in state court. Under those circumstances, the latter is not removable. *See Peacock v. Thomas*, 516 U.S. 349, 354 (1996).

IV

The State argues that removal under the All Writs Act is not proper because the orders of this Court have not been implicated, and because the act cannot be used to remove an action that does not have an independent basis for jurisdiction.

A

The All Writs Act, 28 U.S.C. § 1651(a), provides: "The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law." Interpreting this provision, the Supreme Court has stated that a federal court may "issue such commands under the All Writs Act as may be necessary or appropriate to effectuate and prevent the frustration of orders it has previously issued in its exercise of jurisdiction otherwise obtained. . . ." *United States v. New York Tel.*, 434 U.S. 159, 172 (1977). In *New York Telephone*, a federal district court issued an order authorizing FBI agents to access New York Telephone's facilities. *Id.* at 161. The phone company objected, arguing that the district court lacked jurisdiction over it. *Id.* at 163. On appeal, the Supreme Court upheld the district court's issuance of the writ, stating that

> the power conferred by the Act extends, under appropriate circumstances, to persons who, though not parties to the original action or engaged in wrongdoing, are in a position to frustrate the implementation of a court order or the proper administration of justice, . . . and encompasses even those who have not taken any affirmative action to hinder justice.

Id. at 174 (citations omitted). With respect to the facts before it, the Court noted that without New York Telephone's assistance it would have been difficult or impossible to accomplish the federal court-authorized surveillance. *Id.* at 175.

Neither the Supreme Court nor the Fifth Circuit have stated whether or how the principles announced in *New York Telephone* apply to the use of the All Writs Act in cases where a suit without an independent basis for federal jurisdiction implicates a court-adopted settlement.[9] Several other circuits, however, have; all but one has concluded that the act may be used to remove such cases. *Compare In re Agent Orange Prod. Liability Litig.*, 996 F.2d 1425 (2d Cir. 1993); *Bylinski v. Allen Park*, 169 F.3d 1001 (6th Cir. 1999); *In the Matter of VMS Securities Litig.*, 103 F.3d 1317 (7th Cir. 1996); and *Xiong v. Minnesota*, 195 F.3d 424 (8th Cir. 1999) with *Hillman v. Webley*, 115 F.3d 1461 (10th Cir. 1997); *see also Chance v. Sullivan*, 993 F. Supp. 565 (S.D. Tex. 1998); *Nowling*, *supra*. The leading case affirming the use of the All Writs Act is *In re Agent Orange*, *supra*. In that case, plaintiffs filed suit in Texas state court alleging wholly state-law claims for damages arising out of exposure to Agent Orange. 996 F.2d at 1430. Previously, a class of veterans, which included the Texas plaintiffs, had achieved a settlement with Agent Orange manufacturers; the New York federal district court before whom the class-action was pending adopted the settlement and barred class members from instituting future litigation concerning Agent Orange exposure. *Id.* at 1429. Citing the settlement and the district court's order, defendants removed the Texas state-court proceeding to the New York district court. *Id.* at 1430. Plaintiffs moved for remand, arguing that the Texas suits raised wholly state-law questions. The district court declined to remand, and the Second Circuit affirmed. The circuit court noted

---

[9] The State points to a number of Fifth Circuit cases, including *In re McBryde*, 117 F.3d 208 (5th Cir. 1997), as having decided the issue. In *In re McBryde* (and in the other cases cited by the State) the Fifth Circuit concluded that the All Writs Act cannot be used for removal unless jurisdiction has otherwise been obtained. *See id.* at 219. These cases, however, have not addressed a situation (like the one at bar) where a state-court proceeding affects court orders in a case properly before a federal court. *See also* Lonny S. Hoffman, *Removal Jurisdiction and the All Writs Act*, 148 U. PA. L. REV. 401, 413 (stating that the Fifth Circuit has not decided the issue).

that where "exceptional circumstances" are present, a federal court may employ the All Writs Act to remove an otherwise unremovable action. *Id.* The court found that were the Texas plaintiffs permitted to go forward, the effect on the Agent Orange settlement would be "substantial," *id.* at 1431; by exercising jurisdiction over the Texas claim, the district court was "enforcing an explicit, ongoing order against relitigation of matters it already had decided, and guarding the integrity of its ruling in complex multidistrict litigation over which it had retained jurisdiction," *id.*

Other circuits are in substantial agreement with the Second Circuit's reasoning in *In re Agent Orange*. In *Xiong*, the Eighth Circuit, stated that "a federal court can exercise jurisdiction over a state action pursuant to the All Writs Act if the state action frustrates a previous order by the federal court." 195 F.3d at 426 (citing, *inter alia*, *NAACP v. Metropolitan Council*, 144 F.3d 1168 (8th Cir. 1998)). In that case, Minnesota school children had filed suit alleging that the Minneapolis school system was segregated on the basis of race. 195 F.3d at 425. After the case settled, a federal district court entered a decree barring future litigation and retaining jurisdiction over decree's provisions. *Id.* Later, a class of Minneapolis children brought a claim "identical to those settled and released" in the previous action. *Id.* Citing the district court's orders, defendant removed the state-court action pursuant to the All Writs Act. *Id.* The district court refused to exercise jurisdiction, but the Eighth Circuit reversed, concluding that "federal court control is necessary to effectuate and prevent the frustration of the earlier consent decree. . . ." *Id.* at 427.

Similarly, in *VMS Securities Litigation*, 103 F.3d at 1323, federal-district-court-approved settlements were entered in two securities litigation actions. Among other things, the settlements provided that the class members would release every potential or asserted claim; in both, the district courts expressly retained jurisdiction over the implementation and enforcement of the

settlements. *Id.* at 1320. A group of class members later filed suit in California state court, alleging that Prudential Securities used fraud and misrepresentation to induce investors to sign-off on the settlement agreement. *Id.* at 1319. Prudential removed the suit to federal court, and the investors moved to remand. The investors argued (1) that the alleged conduct was not covered by the terms of the settlement, and (2) that the conduct was based on post-settlement conduct that occurred after the class period closed. *Id.* at 1322. On appeal, the Seventh Circuit concluded that questions regarding Prudential's conduct is "inextricably intertwined with the approved class settlements and the class notice provisions." *Id.* Regarding the timing of the conduct alleged, the court stated that the investors "cannot reasonably assert that the federal district court was without power to adjudicate matters arising out of the class settlement procedures merely because Prudential's alleged conduct occurred after the close of the class periods." *Id.*

B

1. The Court is persuaded, in light of the virtually uniform foregoing precedent, that it may exercise jurisdiction over the instant state-court proceeding pursuant to the All Writs Act. It is not disputed that this Court had jurisdiction over the tobacco litigation; and in this case, as with those above, the Court expressly adopted the final judgment and made it an enforceable order. The final judgment, in turn, adopted the CSA, the first paragraph of which expressly retained jurisdiction over all aspects of the settlement agreement. Among other things, the CSA was declared to be the product "good faith" and "arm[']s[-]length negotiations" by counsel. *See supra* at 3. Certainly, this Court would not have adopted and incorporated the above terms – or the whole CSA for that matter – if it had even an inkling of proof of attorney misconduct along the lines suggested by the State, *see supra* at 7-8 (suggesting, among other things, that Private Counsel agreed to represent the State in the tobacco litigation knowing that OCA was unlawful, and that

Private Counsel's conduct was colored by improper self-interest). If the discovery requested by the State in its petition was to reveal evidence of self-dealing or other unethical behavior, the veracity of counsel's representations concerning the CSA (and the Court's reliance thereon) would be thrown into doubt. As such, the Court cannot conclude, the State's protestations notwithstanding, that the State's petition has nothing to do with the settlement agreement. *Cf. Chance*, 993 F. Supp. at 567 (concluding that "consideration of the allegations [of attorney malfeasance] in this case will entail an inextricably intertwined analysis of the propriety of the Plaintiff's settlement agreement in" the underlying action); *VMS Securities Litig.*, 103 F.3d at 1322 (dismissing the suggestion that a federal court is powerless to address malfeasance that occurred outside the subject matter of the litigation but called into question a court-adopted settlement).

Aside from generally undermining the court-adopted settlement, the Court finds that the State's petition directly invokes several provisions of the CSA and the antisuit injunction. First, the CSA required that Private Counsel make a good-faith approximation of their expenses in prosecuting the tobacco litigation. *See supra* at 3-4. Private Counsel estimated $40 million. This figure was transmitted to the tobacco industry pursuant to court order; the industry, in turn, reimbursed Private Counsel. The State seeks to discover documents that support Private Counsel's estimation. In the event that discovery produced evidence showing that Private Counsel's purported expenses were not tabulated in good faith, Private Counsel would be in direct contravention of this Court's orders.[10]

---

[10] Private Counsel contend that records concerning their litigation expenses are not discoverable because the June 1998 agreement made such records undiscoverable if Private Counsel choose, as they did, to take the panel award rather than pursue OCA's contingency-fee provisions. The State, on the other hand, contends that it was not a party to the Agreement. The Court expresses no opinion on this subject as the resolution of the State's motion to remand

Second, documents and other materials produced during the course of discovery in the tobacco litigation are, by and large, under court-ordered seal. The protective orders require application to this Court prior to disclosure; any questions regarding the scope of the protective orders must be submitted to this Court for resolution. *See supra* at 4. Third, the anti-suit injunction entered by this Court prescribes litigation before any court (except this one) concerning any aspect of the final judgment. The final judgment directly addresses, among other things, Private Counsel's litigation expenses and fees and the propriety of counsel's representations concerning the CSA. Finally, the State's recovery from the tobacco industry is contingent the upon the recovery of certain other settling states and vice versa. (*See* CSA at 19-20, ¶ 17.) Were the State to prevail in an action against Private Counsel, any damages the State received conceivably would upset the parity essential to the settlement scheme.

Further, the Court believes that for wholly prudential reasons this Court is the appropriate forum to address Private Counsel's alleged misconduct. As the Court has noted before, this Court, through its work on the tobacco litigation, has had extensive experience dealing with Private Counsel. Were the State to raise the questions it has in another forum much of the record would have to be considered anew. Along the same lines, this Court is clearly in the best position to interpret the effect of its own orders, including whether records of Private Counsel's expenses are discoverable (*see* note 10, *supra*).

Finally, and most importantly insofar as this Court is concerned, the Court has a duty to safeguard the interests of those who come before it seeking relief. This Court cannot – and will not – be left impotent while attorneys run roughshod over the rights of parties, the rules of professional responsibility, and

---

does not require it.

the orders of this Court.

2. This Court's preceding jurisdictional analyses are akin to those in *Chance v. Sullivan*, 993 F. Supp. 565 (S.D. Tex. 1998). In *Chance*, Judge Kent accepted and approved a settlement agreement that, among other things, concluded that the amount of attorneys' fees was calculated in good faith. *Id.* at 567. Thereafter, plaintiffs to the settled action brought suit against their attorneys, asserting claims for breach of fiduciary duty, common law fraud, fraud in the inducement, conversion, legal malpractice, and violations of Texas's deceptive practices act. The suit was filed in state court and alleged wholly state-law claims. The attorneys removed the action, and plaintiffs moved to remand. *Id.*

Notwithstanding Judge Kent's sentiment – which is identical to this Court's here – that "nothing would please the Court more than to send these claims back to state court," *id.* at 567, Judge Kent stated that he felt "a moral responsibility to proceed with an ultimate resolution of the issues raised by the [underlying] case and all of its ensuing outgrowths." *Id.* Specifically, Judge Kent declined to remand on two grounds. First, he noted that the resolution of plaintiffs' claims would "likely [] affect the scope and validity of the [underlying] settlement order." *Id.* Since the underlying case was based on a question of federal law, and because attorney-conduct questions were closely related to the underlying case, Judge Kent concluded that he could remove the case pursuant to 28 U.S.C. §§ 1441 and 1367.[11] *Id.* Second, the court concluded that it could exercise jurisdiction over the state-court attorney-conduct dispute under the All Writs Act. *Id.* Judge Kent found (as this Court has here) that plaintiff's suit called "into question the propriety of a settlement approved in an Order of the Court." *Id.* at 568. Therefore, the exercise of

---

[11] For the reasons stated, supra, the Court declines to exercise jurisdiction on these bases.

jurisdiction is necessary not only to protect the integrity of the Court's Order, but also because this Court is most qualified to review the settlement and the claims arising from the handling of the litigation before the Court.

C

"Removal" under the All Writs Act has recently been the subject of academic debate. *See, e.g.*, Joan Steinman, *The Newest Frontier of Judicial Activism: Removal Under the All Writs Act*, 80 B.U. L. REV. 773 (2000); Lonny S. Hoffman, *Removal Jurisdiction and the All Writs Act*, 148 U. PA. L. REV. 401 (1999). In his article, Professor Hoffman argues, much as the State does here, that *Rivet v. Regions Bank of Louisiana*, 522 U.S. 470 (1998), should be read as proscribing the removal of cases that challenge a judgment or other order of a federal court. In *Rivet*, the Court held that "claim preclusion by reason of a prior federal judgment is a defensive plea that provides no basis for removal under § 1441(b)." *Id.* at 478. Professor Hoffman thinks that to sidestep § 1441 and remove a state-court proceeding under the All Writs Act on the grounds that it is precluded by a federal court judgment would effectively eviscerate the Supreme Court's holding in *Rivet*. *See* Hoffman, *supra* 148 U. PA. L. REV. at 423. There is a difference though – and Professor Hoffman points this out – between the use of the All Writs Act to remove a state-court action that threatens to undermine a federal court order, and the use of the writ to remove a state-court proceeding based on claim preclusion. *Id.* at 414. While Hoffman argues that removal in the latter case is barred by *Rivet*, he does not so argue with respect to the former. *Id.*

In this case, the Court does not hold that the State's suggestions of malfeasance on the part of Private Counsel are barred by a prior determination of this Court. Indeed, it is just the opposite: the Court has never addressed the allegations raised by the State, nor does the Court express an opinion about them now.

Rather, in light of the foregoing, the Court concludes that the State's petition initiates a discovery proceeding that, if it produces what the State thinks it will, will call into doubt the efficacy of this Court's orders. It is for this reason that the Court concludes that removal under the All Writs Act is appropriate.

V

The State argues that the Eleventh Amendment proscribes removal of the instant state-court proceeding to this Court. The Eleventh Amendment provides, in relevant part, that

> the judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another state. . . .

U.S. Const. amend XI. A straight-forward reading of the Eleventh Amendment would seem to put this controversy to rest: the amendment proscribes suits against states, not by them. The Supreme Court's reading of the Eleventh Amendment, however, has consistently exceeded the scope of the amendment's text. *See, e.g., Alden v. Maine*, 527 U.S. 706 (1999) ("[A] state's immunity from suit is demarcated not by the text of the Amendment alone but by the fundamental postulates implicit in the constitutional design."). And importantly, the Court's recent jurisprudence has reflected an enhanced respect for state sovereignty. *See Port Auth. Trans-Hudson Corp. v. Feeney*, 495 U.S. 299, 307 (1990).

These initial observations aside, courts have consistently held that when a state brings suit as plaintiff the Eleventh Amendment is not implicated. *See, e.g., Regents of the Univ. of Cal. v. Eli Lilly & Co.*, 119 F.3d 1559, 1564 (Fed. Cir. 1997), *cert. denied*, 523 U.S. 1089 (1998). Implicit in these holdings is the conclusion that where a state initiates suit the policies behind sovereign immunity – namely, that states not suffer the indignity of being subjected to the "coercive process of judicial tribunals

at the instance of private parties," *Alden*, 119 S. Ct. at 2264, and that a state not be "thrust, by federal fiat and against its will, into the disfavored status of a debtor," *id.* – are not implicated. Thus, while the Supreme Court's recent decisions have articulated an expanded concept of state sovereign immunity, they have left unchanged the well settled proposition that a state may waive its Eleventh Amendment immunity by voluntarily invoking the jurisdiction of the federal court, either by defending an action in federal court on its merits or by "voluntarily submitting its rights to judicial determination" in federal court. *See College Sav. Bank v. Florida Prepaid Postsecondary Educ. Expense Bd.*, 119 S. Ct. 2219, 2226 (1999); *see also Hill v. Blind Indus. & Servs. of Md.*, 179 F.3d 754 (9th Cir. 1999) (holding that participation in extensive pretrial activities sufficient to waive Eleventh Amendment immunity); *Sutton v. Utah State Sch. for the Deaf & Blind*, 173 F.3d 1226 (10th Cir. 1999) (concluding that removal followed by a defense on the merits sufficient to waive the state's Eleventh Amendment immunity); *Dekalb County Div. of Family & Children Servs. v. Platter*, 140 F.3d 676, 680 (7th Cir. 1998) (stating that when a state voluntarily enters a federal forum by filing a claim, "it cannot run back to seek Eleventh Amendment protection"). In this case, the State chose to initiate the tobacco litigation in this Court, and nowhere is it argued that it was unlawful for the State to do so. Accordingly, the State has waived its sovereign immunity for purposes of this litigation.

Notwithstanding the foregoing, the State argues that even if it did consent to adjudication in this Court, removal of the instant state-court proceeding is prohibited. In support of its argument, the State points to *California v. Steelcase, Inc.*, 792 F. Supp. 84 (C.D. Cal.1992). In *Steelcase*, the State of California filed a civil enforcement action in state court and defendant removed on several bases. *Id.* at 85. The state moved for remand, which the court granted. The court, without citing any authority, concluded that a state's Eleventh Amendment immunity from suit should apply equally to the case where the state is a plaintiff in a

state-court action that is removed to federal court. *Id.* at 86. The Court notes that most courts have declined to follow *Steelcase. Compare Regents of the Univ. of Minn. v. Glaxo Wellcome, Inc.*, 58 F. Supp. 2d 1036, 1040 (D. Minn. 1999); *Kansas ex rel. Stovall v. Home Cable, Inc.*, 35 F. Supp. 2d 783 (D. Kan. 1998); *Vermont v. Oncor Comm., Inc.*, 166 F.R.D. 313, 321 (D. Vt. 1996); and *South Dakota State Cement Plant Comm'n v. Wausau Underwriters Ins. Co.*, 778 F. Supp. 1515, 1522 (D.S.D. 1991) with *Moore v. Abbott Laboratories, Inc.*, 900 F. Supp. 26, 30 (S.D. Miss. 1995). But even were the Court to follow *Steelcase*, it would not affect this Court's finding that the State, when it initiated litigation in this Court, waived its sovereign immunity with respect the tobacco litigation and all of its outgrowths. Accordingly, the Court concludes that the Eleventh Amendment does not preclude removal of the State's petition.

Conclusion

For the foregoing reasons the State's motion to remand is DENIED.

Signed this 15th day of August, 2000.

DAVID FOLSOM

UNITED STATES DISTRICT JUDGE

APPENDIX C

No. 00-40999

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

STATE OF TEXAS,
Petitioner-Appellant,

v.

REAL PARTIES In Interest,
Including Walter Umphrey, John O'Quinn,
John Eddie Williams, Wayne Reaud and
Harold Nix, Respondents-Appellees.

August 23, 2001

ON PETITIONS FOR REHEARING
AND REHEARING EN BANC

Before GARWOOD, JOLLY, and DeMOSS, Circuit Judges.

PER CURIAM:

(X) The Petitions for Rehearing are DENIED and no member of this panel nor judge in regular active service on the court having requested that the court be polled on Rehearing En Banc (Fed. R. App. P. and 5th Cir. R. 35) the Petitions for Rehearing En Banc are also DENIED.

( ) The Petitions for Rehearing are DENIED and the court having been polled at the request of one of the members of the court and a majority of the judges who are in regular active service not having voted in favor (Fed. R. App. P. and 5th Cir. R.

35) the Petitions for Rehearing En Banc are also DENIED.

( ) A member of the court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service not having voted in favor, Rehearing En Banc is DENIED.

ENTERED FOR THE COURT.